Logan a/l Segaran & Ors v Kerajaan Malaysia

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24–26–11 OF 2024
NARKUNAVATHY SUNDARESON J
22 DECEMBER 2025

Constitutional Law — Legislation — Constitutionality — Plaintiffs were charged under s 130V(1) of Penal Code — Plaintiffs subjected to procedure under Security Offences (Special Measures) Act 2012 ('the SOSMA') — Plaintiffs brought action challenging constitutionality of ss 4(5), 13, 14, 15, 16, 18A, 20 and/or 30 of the SOSMA — Whether ss 4(5), 13, 14, 15, 16, 18A, 20 and/or 30 of SOSMA complied with arts 5, 8, 121(1) and 149 of Federal Constitution — Whether civil courts had jurisdiction to hear plaintiffs' application — Whether plaintiffs had locus standi — Federal Constitution arts 5, 8, 121(1) & 149 — Penal Code s 130V(1) — Security Offences (Special Measures) Act 2012 ss 3, 4(5), 13, 14, 15, 16, 18A, 20, 30 & First Schedule

The plaintiffs were charged under s 130V(1) of the Penal Code ('Act 574'), an offence which fell under Chapter VIB of Act 574 and categorised as security offence pursuant to the First Schedule of the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA'). Therefore, the plaintiffs were subjected to the procedure under the SOSMA. Aggrieved, the plaintiffs filed encl 1 for the following reliefs: (a) a declaration that the SOSMA was null and void for contravening art 149 of the Federal Constitution ('the Constitution'); and (b) a declaration that ss 4(5), 13, 14, 15, 16, 18A, 20 and/or 30 of the SOSMA ('the provisions') were null and void for contravening arts 8, 121(1) and/or 149 of the Constitution. In addition to the issues regarding the constitutionality of the provisions, the court was also required to determine the following issues: (i) whether the civil court served as the appropriate forum to determine the plaintiffs' challenges to the provisions, given the pending criminal charges against them at the trial High Court; and (ii) the locus standi of the plaintiffs in instituting the present challenge against the provisions.

Held, dismissing encl 1 in respect of ss 4(5), 13, 14, 15, 16, 18A and 20 of SOSMA and holding that these provisions were constitutional and valid, and declaring that s 30 of the SOSMA was unconstitutional and invalid as it violated art 121(1) of the Constitution, with no order as to costs:

(1) The challenges to the constitutionality of provisions in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133, *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 and *Heidy Quah Gaik Li v Kerajaan Malaysia* [2025] 6 MLJ 693, were all

challenges to substantive law rather than administrative acts and all the individuals concerned either faced or were facing prosecution in criminal courts. The civil courts in those cases were not deterred from adjudicating the constitutional validity of the provisions in question nor did such adjudication constitute interference with the criminal proceedings. Whether the challenge was directed at a substantive or procedural law was only significant for purposes of determining the nature of the constitutional protection and the grounds for judicial intervention, rather than the court's jurisdiction to hear the case. The judiciary remained the final arbiter of constitutionality to ensure that both the executive and the legislature operated within their respective constitutional boundaries. For this reason, the court found that the court was empowered to determine the plaintiff's action (see paras 19–23).

(2) As the provisions in question directly affect the conduct of the plaintiffs' pending criminal trial, the court was satisfied that the plaintiffs had a sufficient interest in the subject matter. This actual controversy established their standing (see para 27).

(3) With respect to s 4(5) of the SOSMA, the power and authority to detain a person for investigation purposes was not exclusively a judicial function. This power was inherently an executive function that flowed from the state's authority to effect an arrest. Although s 4(5) was inconsistent with the procedural safeguards in art 5(4) of the Constitution, this inconsistency did not render the provision unconstitutional or invalid. As a law enacted under art 149(1), such inconsistencies were expressly provided for. There was also no removal of judicial oversight. A detenu could mount a challenge on the legality of his detention past the 24 hours, by way of a habeas corpus application under art 5(2). In addition, s 4(5) was both proportionate and rationally connected to the SOSMA's objective of addressing security threats, as such, the 28-day detention period did not violate the principle of equality under art 8(1) (see paras 59–60, 62–63 & 67).

(4) In relation to s 13 of the SOSMA, the court found that: (a) the prohibition of bail did not displace the presumption of innocence enshrined in the Constitution, for the simple reason that the accused's guilt or innocence had yet to be determined by a court; (b) the constitutionality validity of s 13 remained preserved by virtue of art 149(1); (c) based on the decisions in *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549, and *Samat bin Yamin v Public Prosecutor* [2023] 4 MLJ 613, the court was satisfied that s 13(1) did not violate the principle of proportionality under art 8(1); and (d) s 13(1) did not displace judicial power exercisable by the court (see paras 72–74, 77 & 79).

(5) In relation to ss 14, 15 and 16 of the SOSMA, the court found that: (a) the plaintiffs' right to a fair trial was preserved because they still retained their right to cross-examine the protected witness during the trial; (b) the constitutionality validity of these provisions remained preserved by virtue of art 149(1); (c) these provisions which were only applicable to security offences under the SOSMA and only in respect of prosecution witnesses were not discriminatory and did not violate art 8(1) — the basis of this intelligible differentia rested on s 3 of the SOSMA, which addressed potential jeopardy to evidence collection, intelligence gathering, and/or the safety and lives of those involved and this basis also had a rational connection to the legislative aim of the SOSMA; and (d) the plaintiff's allegation that there was a violation of art 121(1) was without merit as there was no legal basis to protect the identity of the defence witnesses (see paras 89–92, 94–95 & 97).

(6) The admissibility of statements and exhibits under ss 18A and 20 of the SOSMA did not violate the right to a fair trial. While these provisions mandated the admission of such evidence, they did not abrogate judicial power. The court retained the ultimate authority to evaluate the credibility and weight of this evidence at both the close of the prosecution's case and the conclusion of the trial. The detenus retained their right to challenge the evidential value of all materials presented against them (see paras 103 & 105).

(7) In short, although ss 4(5), 13, 14, 15, 16, 18A and 20 of the SOSMA modified traditional procedural or evidentiary rules, they did not displace the core adjudicatory function of the judiciary as the court retained judicial oversight and remained the final arbiter of fact. As these measures allowed the detenu a chance to challenge the prosecution's case, they remained consistent with the right to a fair trial under art 5 and were shielded by the special legislative powers granted under art 149. These provisions also satisfied the principle of proportionality and had a rational nexus with the objective of SOSMA. Therefore, the plaintiffs had failed to discharge the heavy legal burden of proof required to demonstrate that these provisions were unconstitutional (see paras 119–122).

(8) The court held that mandatory remand requirement in s 30 of the SOSMA violated the sanctity of judicial powers vested in the judiciary and ignored the role of judges as arbiters. While the Legislature maintained the authority to enact special measures for security offences under art 149, those laws could not completely extinguish the core adjudicatory functions of the judiciary. Therefore, the court found that s 30 of the SOSMA was unconstitutional and invalid as it offended art 121(1) of the Federal Constitution (see paras 107, 110–111, 118 & 123–124).

[Bahasa Malaysia summary

Plaintif-plaintif telah dituduh di bawah s 130V(1) Kanun Keseksaan ('Akta 574'), suatu kesalahan yang termasuk di bawah Bab VIB Akta 574 dan dikategorikan sebagai kesalahan keselamatan menurut Jadual Pertama Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (Akta 747) ('SOSMA'). Oleh itu, plaintif-plaintif telah tertakluk kepada prosedur di bawah SOSMA. Tidak berpuas hati dengan keadaan tersebut, plaintif-plaintif telah memfailkan lampiran 1 untuk mendapatkan relif-relif berikut: (a) suatu deklarasi bahawa SOSMA adalah terbatal dan tidak sah kerana melanggar perkara 149 Perlembagaan Persekutuan ('Perlembagaan'); dan (b) suatu deklarasi bahawa ss 4(5), 13, 14, 15, 16, 18A, 20 dan/atau 30 SOSMA ('peruntukan-peruntukan tersebut') adalah terbatal dan tidak sah kerana melanggar perkara 8, 121(1) dan/atau 149 Perlembagaan. Selain isu-isu mengenai keperlembagaan peruntukan-peruntukan tersebut, mahkamah juga dikehendaki menentukan isu-isu berikut: (i) sama ada mahkamah sivil merupakan forum yang sesuai untuk menentukan cabaran plaintif-plaintif terhadap peruntukan-peruntukan tersebut, mengambil kira pertuduhan jenayah yang belum selesai terhadap mereka di Mahkamah Tinggi; dan (ii) locus standi plaintif-plaintif dalam memulakan cabaran semasa terhadap peruntukan-peruntukan tersebut.

Diputuskan, menolak lampiran 1 berkenaan dengan ss 4(5), 13, 14, 15, 16, 18A dan 20 SOSMA dan memutuskan bahawa peruntukan-peruntukan ini adalah berperlembagaan dan sah, dan mengisytiharkan bahawa s 30 SOSMA adalah tidak berperlembagaan dan tidak sah kerana ia melanggar perkara 121(1) Perlembagaan tanpa perintah mengenai kos:

(1) Cabaran terhadap keperlembagaan peruntukan-peruntukan dalam kes *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133, *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, dan *Heidy Quah Gaik Li v Kerajaan Malaysia* [2025] 6 MLJ 693, semuanya merupakan cabaran kepada undang-undang substantif dan bukannya akta pentadbiran dan semua individu yang berkenaan sama ada menghadapi atau sedang menghadapi pendakwaan di mahkamah jenayah. Mahkamah sivil dalam kes-kes tersebut tidak dihalang daripada mengadili keperlembagaan peruntukan-peruntukan yang dipersoalkan dan juga tidak dianggap sebagai gangguan terhadap prosiding jenayah. Sama ada sesuatu cabaran itu ditujukan kepada undang-undang substantif atau prosedur hanya penting untuk tujuan menentukan sifat perlindungan perlembagaan dan alasan untuk campur tangan kehakiman, dan bukannya bidang kuasa mahkamah untuk mendengar kes tersebut. Badan kehakiman kekal sebagai pengadil terakhir keperlembagaan untuk memastikan bahawa kedua-dua Badan Eksekutif dan Badan Perundangan beroperasi dalam sempadan perlembagaan masing-masing. Atas sebab ini, mahkamah mendapati

bahawa mahkamah mempunyai kuasa untuk menentukan tindakan plaintif-plaintif (lihat perenggan 19–23).

(2) Memandangkan peruntukan-peruntukan yang dipersoalkan tersebut secara langsung mempengaruhi pengendalian perbicaraan jenayah plaintif-plaintif yang sedang menunggu perbicaraan, mahkamah berpuas hati bahawa plaintif-plaintif mempunyai kepentingan yang mencukupi dalam perkara tersebut. Kontroversi sebenar ini membuktikan kedudukan mereka (lihat perenggan 27).

(3) Berkenaan dengan s 4(5) SOSMA, kuasa dan autoriti untuk menahan seseorang bagi tujuan siasatan bukanlah semata-mata fungsi Kehakiman. Kuasa ini secara semulajadinya merupakan fungsi Eksekutif yang mengalir daripada kuasa eksekutif untuk melaksanakan penangkapan. Walaupun s 4(5) tidak konsisten dengan perlindungan prosedur dalam perkara 5(4) Perlembagaan, ketidakselarasan ini tidak menjadikan peruntukan tersebut tidak berperlembagaan atau tidak sah. Sebagai undang-undang yang digubal di bawah perkara 149(1), ketidakselarasan tersebut telah diperuntukkan secara nyata. Tiada juga penyingkiran pengawasan Kehakiman. Detenu boleh mencabar keabsahan penahanannya selepas 24 jam, melalui permohonan habeas corpus di bawah perkara 5(2). Di samping itu, s 4(5) adalah berkadaran dan rasional dengan objektif SOSMA untuk menangani ancaman keselamatan, oleh itu, tempoh tahanan 28 hari tersebut tidak melanggar prinsip kesaksamaan di bawah perkara 8(1) (lihat perenggan 59–60, 62–63 & 67).

(4) Berhubung dengan s 13 SOSMA, mahkamah mendapati bahawa: (a) larangan ikat jamin tidak menggantikan anggapan tidak bersalah yang termaktub dalam Perlembagaan, atas sebab mudah bahawa kebersalahan atau ketidakbersalahan tertuduh masih belum ditentukan oleh mahkamah; (b) keperlembagaan s 13 kekal dipelihara berdasarkan perkara 149(1); (c) berdasarkan keputusan dalam kes *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549, dan *Samat bin Yamin v Public Prosecutor* [2023] 4 MLJ 613, mahkamah berpuas hati bahawa s 13(1) tidak melanggar prinsip perkadaran di bawah perkara 8(1); dan (d) s 13(1) tidak menggantikan kuasa Kehakiman yang boleh dilaksanakan oleh mahkamah (lihat perenggan 72–74, 77 & 79).

(5) Berhubung dengan ss 14, 15 dan 16 SOSMA, mahkamah mendapati bahawa: (a) hak plaintif-plaintif untuk perbicaraan yang adil dipelihara kerana mereka masih mengekalkan hak mereka untuk menyoal balas saksi yang dilindungi semasa perbicaraan; (b) keperlembagaan peruntukan-peruntukan ini kekal dipelihara berdasarkan perkara 149(1); (c) peruntukan-peruntukan ini yang hanya terpakai kepada kesalahan keselamatan di bawah SOSMA dan hanya berkenaan dengan saksi-saksi pendakwaan tidak bersifat diskriminasi dan tidak melanggar

perkara 8(1) — asas perbezaan yang boleh difahami ini terletak pada s 3 SOSMA, yang menyatakan tentang potensi bahaya kepada pengumpulan keterangan, pengumpulan risikan, dan/atau keselamatan dan nyawa mereka yang terlibat dan asas ini juga mempunyai kaitan rasional dengan matlamat perundangan SOSMA; dan (d) dakwaan plaintif-plaintif bahawa terdapat pelanggaran terhadap perkara 121(1) adalah tidak bermerit kerana tiada asas undang-undang untuk melindungi identiti saksi-saksi pembelaan (lihat perenggan 89–92, 94–95 & 97).

(6) Kebolehterimaan pernyataan dan eksibit di bawah ss 18A dan 20 SOSMA tidak melanggar hak untuk perbicaraan yang adil. Walaupun peruntukan-peruntukan ini mewajibkan penerimaan keterangan sedemikian, ia tidak membatalkan kuasa kehakiman. Mahkamah mengekalkan kuasa muktamad untuk menilai kredibiliti dan nilai pemberatan keterangan ini pada penutupan kes pendakwaan dan pada akhir perbicaraan. Pihak detenus mengekalkan hak mereka untuk mencabar nilai keterangan bagi semua bukti yang dikemukakan terhadap mereka (lihat perenggan 103 & 105).

(7) Pendek kata, walaupun ss 4(5), 13, 14, 15, 16, 18A dan 20 SOSMA mengubah suai peraturan prosedur atau pembuktian tradisional, ia tidak menggantikan fungsi penghakiman teras Badan Kehakiman kerana mahkamah mengekalkan pengawasan kehakiman dan kekal sebagai pengadil akhir ke atas fakta. Memandangkan langkah-langkah ini memberi peluang kepada detenu untuk mencabar kes pendakwaan, ia kekal konsisten dengan hak untuk perbicaraan yang adil di bawah perkara 5 dan dilindungi oleh kuasa perundangan khas yang diberikan di bawah perkara 149. Peruntukan-peruntukan ini juga memenuhi prinsip perkadaran dan mempunyai hubungan rasional dengan objektif SOSMA. Oleh itu, plaintif-plaintif telah gagal melepaskan beban pembuktian undang-undang yang berat yang diperlukan untuk menunjukkan bahawa peruntukan-peruntukan ini tidak berperlembagaan (lihat perenggan 119–122).

(8) Mahkamah memutuskan bahawa keperluan reman mandatori dalam s 30 SOSMA melanggar kesucian kuasa kehakiman yang diberikan kepada badan kehakiman dan mengabaikan peranan hakim sebagai penimbang tara. Walaupun badan perundangan mengekalkan kuasa untuk menggubal langkah khas bagi kesalahan keselamatan di bawah perkara 149, undang-undang tersebut tidak boleh memadamkan sepenuhnya fungsi penghakiman teras badan kehakiman. Oleh itu, mahkamah mendapati bahawa s 30 SOSMA adalah tidak berperlembagaan dan tidak sah kerana ia melanggar perkara 121(1) Perlembagaan (lihat perenggan 107, 110–111, 118 & 123–124).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 1 LNS 437, FC (refd)

Bird Dominic Jude v PP [2014] 3 MLJ 745; [2014] 4 CLJ 113, FC (distd)

Dato' Seri Anwar bin Ibrahim v PP [2000] 2 MLJ 486, CA (refd)

Dato' Seri Anwar bin Ibrahim v Mohamad Hanafiah bin Hj Zakaria (as the DPP at the AG's Chambers who had signed an undated written statement of facts favourable to the defence under s 51A(1)(c) of the CPC) & Ors [2010] 2 MLJ 271, HC (distd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 3 CLJ 593, FC (refd)

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285; [2010] 2 CLJ 925, FC (refd)

Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor [2021] 6 MLJ 68; [2021] 6 CLJ 1, FC (refd)

Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1; [2022] 1 LNS 583, FC (refd)

Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors [2023] 2 MLJ 296; [2023] 3 CLJ 653, FC (refd)

Heidy Quah Gaik Li v Kerajaan Malaysia [2025] 6 MLJ 693, CA (refd)

Honworld Chemicals & Machinery Sdn Bhd dan lain-lain lwn Ketua Pengarah Kastam Malaysia, Jabatan Kastam Diraja Malaysia dan lain-lain [2017] 8 MLJ 622; [2016] CLJU 1240, HC (distd)

Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323; [2021] 3 CLJ 465, FC (refd)

Inspector Yusof Hj Othman & Ors v Kwan Hung Cheong [2018] supp MLJ 224, FC (refd)

JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)

Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133; [2018] 3 CLJ 1, FC (refd)

Ketheeswaran a/l Kanagaratnam & Anor v PP [2024] 1 MLJ 851; [2024] 2 MLRA 288, FC (folld)

Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177; [2022] 3 MLRA 131, FC (refd)

Lembaga Minyak Sawit Malaysia & Anor v Innovans Palm Industries Sdn Bhd [2023] 2 MLJ 742; [2023] 3 CLJ 715, CA (refd)

Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309; [2016] 4 CLJ 12, FC (refd)

Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another

appeal [2023] 6 MLJ 483, FC (refd)
Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan [2024] 2 MLJ 150; [2024] 3 CLJ 323, FC (refd)
Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenavah & Ors (Criminal Appeal No 05(HC)-7–01 of 2020(W)) (unreported), FC (refd)
PP v Aszroy bin Achoi [2018] 9 MLJ 702, HC (refd)
PP v Atik Hussin bin Abu Bakar and other cases [2016] MLJU 968, HC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] CLJU 97 (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12; [2017] 4 CLJ 41, FC (refd)
PP v Hassan bin Hj Ali Basri [2014] 7 MLJ 153; [2014] 2 CLJ 72, HC (refd)
PP v Jafperi bin Noor & Anor [2024] 11 MLJ 289; [2024] 7 CLJ 827, HC (refd)
PP v Khairuddin bin Abu Hassan & Anor [2017] MLJU 188; [2017] 4 CLJ 701, CA (refd)
PP v Yazid bin Sufaat & Ors [2015] 1 MLJ 571; [2014] 2 CLJ 670, CA (refd)
Pendakwa Raya lwn Mahadi bin Mamat [2025] 8 MLJ 591, HC (refd)
Raman a/l Shunmugham lwn Pendakwa Raya [2020] 2 MLJ 675; [2020] 2 CLJ 818, CA (refd)
Rosli bin Sahak dan satu lagi lwn Ketua Polis Negara [2022] MLJU 952; [2022] CLJU 991, HC (refd)
Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181; [2021] 3 CLJ 301, FC (refd)
Samat bin Yamin v PP [2023] 4 MLJ 613; [2023] 6 CLJ 1, FC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 1 MLRA 83, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit [2014] MLJU 1874; [2015] 2 CLJ 328, CA (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC (refd)
Siti Noor Aishah bt Atam lwn Pendakwa Raya [2018] 6 MLJ 614; [2018] 5 CLJ 44, CA (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507; [2009] 1 LNS 147, FC (refd)
Subramaniam a/l Batumalai v Ketua Polis Negara [2019] MLJU 1713, HC (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (refd)
Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC
Tan Sri Eric Chia v Attorney General [2005] 4 MLJ 433; [2007] 1 CLJ 565, HC (distd)
Tanasilan a/l Nakethiran v PP & Ors [2023] MLJU 995, HC (refd)

Yanasegar a/l Vadivelu & Ors v PP [2022] MLJU 3235, HC (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 61A, Part IIIA
Courts of Judicature Act 1964 s 56A
Criminal Procedure Code ss 387, 388, 390
Federal Constitution arts 4(1), 5, 5(1), (2), (4), 8, 8(1), 9, 10, 13, 121, 121(1), 149, 149(1), 151
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012)
Penal Code s 130V, Chapters VI, VIA, VIB
Penal Code (Amendment) Act 2012
Security Offences (Special Measures) Act 2012 ss 3, 4(5), 13, 13(1), (2), (2)(c), 14, 15, 16, 18A, 20, 30, First Schedule
Security Offences (Special Measures) (Amendment) Act 2014
Security Offences (Special Measures) (Amendment) Act 2015
Security Offences (Special Measures) (Amendment) Act 2024
Special Measures Against Terrorism in Foreign Countries Act 2015

Malik Imtiaz Sarwar (with Surendra Ananth and Abby Si Xinyi) (Malik Imtiaz Sarwar); Harpal Singh Tara Singh (with Low Carmen) (T Harpal & Assoc) for the for the applicants.
Mohammad Sallehuddin bin Md Ali (Attorney General's Chambers) for the respondent.

Narkunavathy Sundareson J:

INTRODUCTION

[1] Unless otherwise indicated, all references to sections will be in reference to Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA') and articles will be in reference to the Federal Constitution ('the FC').

[2] In encl 1, the plaintiffs sought the following reliefs:

(a) a declaration that SOSMA is null and void for contravening art 149; and

(b) a declaration that ss 4(5), 13, 14, 15, 16, 18A, 20 and/or 30 ('provisions') are null and void for contravening arts 8, 121(1) and/or 149.

[3] After careful consideration of the cause papers and both the written and oral submissions, this court dismissed encl 1 save for the relief in relation to s 30. The following are the reasons for the decision.

BACKGROUND FACTS

[4] The facts leading to encl 1 can be summarized as follows. The plaintiffs were charged at the High Court in Klang (trial High Court) on the following charge:

> Bahawa kamu, antara November 2019 hingga 4 Sep 2024, bertempat di Sungai Janggut Seafood Restoran (Jeram) Sdn Bhd, No 16, Jalan Bagan Sg Janggut, Jeram 45800 Jeram Selangor dalam Daerah Kuala Selangor, dalam Negeri Selangor Darul Ehsan, telah didapati menjadi ahli kumpulan jenayah terancang 'Geng TR' dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 103V(1) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah seksyen yang sama.

[5] The charge against the plaintiffs fell within the ambit of Chapter VIB in the First Schedule, SOSMA and thus categorised as a security offence. Therefore, the plaintiffs were subjected to the procedure provided under SOSMA.

[6] Plaintiffs 5, 8, 14 and 15 have since been granted bail under s 13(2)(c) and were no longer in custody. The hearing is fixed for 5–10 October 2026 and 9–20 November 2026.

THE PLAINTIFFS' COMPLAINTS

[7] Although in prayer (1) of encl 1, the plaintiff sought to invalidate the SOSMA in its entirety, during oral submissions, plaintiffs' counsel clarified that the challenge was confined to only the provisions as per prayer (2) in encl 1.

[8] In essence, encl 1 prayer (2) was premised on the following broad grounds:

(a) the provisions removed constitutional safeguards against arbitrary detention, displaced judicial oversight and vested judicial powers in the executive; this contravened art 121 and derogated from safeguards guaranteed under art 5; and

(b) the provisions were discriminatory, arbitrary and disproportionate as they disregarded procedural fairness, the presumption of innocence and created asymmetries between prosecution and defence; this contravened art 8.

A THE DEFENDANT'S RESPONSE

[9] In their affidavit-in-reply, the defendant denied the plaintiffs' allegations and maintained that the provisions were constitutional and valid.

B **[10]** The plaintiffs were only charged with a security offence and therefore only affected by s 13 and not by the other provisions. Therefore, they only had the locus standi to challenge the constitutionality of s 13 and not the other provisions.

C **[11]** The defendant contended that the challenge to the constitutionality of the provisions was not grounded on any facts relating to the plaintiffs and therefore purely academic.

D **[12]** Lastly, the defendant averred that the provisions essentially involved criminal procedure and therefore any challenge to the constitutionality of these provisions ought to be raised in the criminal proceedings against the plaintiffs before the trial High Court and not by way of encl 1 in the civil High Court.

E PRELIMINARY ISSUES

Jurisdiction of the civil High Court

[13] This court's jurisdiction to hear challenges to the constitutionality of
F any provision of law vis a vis the FC is not in question. This authority is explicitly conferred by art 4(1), which establishes the FC as the supreme law of the land, rendering any law inconsistent with the FC void to the extent of that inconsistency.

G **[14]** In *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 CLJ 339, Tengku Maimun CJ held at p 369 (MLJ):

> Constitutional judicial review is ingrained within cl (1) of art 4 of the FC which stipulates that the FC being supreme, any law inconsistent with it is void to the
H extent of the inconsistency with the FC. Two things are corollary to this mighty declaration. First, the Civil Federal Judiciary is the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC. This is by virtue of cl (1) of art 121 of the FC which stipulates that judicial power resides in the two High Courts — essentially
I the superior courts established under Part IX of the FC. This is the correct proposition of law whether pre-amendment or post-amendment of cl (1) of art 121.

(See also *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323; [2021] 3 CLJ 465, *Rosliza bt Ibrahim v Kerajaan Negeri Selangor &*

Anor [2021] 2 MLJ 181 at p 222; [2021] 3 CLJ 301.)

[15] The central issue is whether this curt serves as the appropriate forum to determine the plaintiffs' challenges to the provisions, given the pending criminal charges against them at the trial High Court.

[16] The plaintiffs contended that encl 1 required this court to assess the constitutionality of the provisions against established constitutional safeguards. This evaluation did not involve a determination of their criminal liability, necessitate this court to exercise criminal jurisdiction nor interfere with the pending criminal proceedings at the trial High Court.

[17] The defendant, on the other hand, argued that the SOSMA primarily governed the procedures for security offences. Therefore, any challenge to the procedural provisions should fall under the jurisdiction of the trial High Court.

[18] This court perused all the authorities cited by both parties. *Tan Sri Eric Chia v Attorney General* [2005] 4 MLJ 433; [2007] 1 CLJ 565, *Dato' Seri Anwar bin Ibrahim v Mohamad Hanafiah bin Hj Zakaria (as the DPP at the AG's Chambers who had signed an undated written statement of facts favourable to the defence under s 51A(1)(c) of the CPC) & Ors* [2010] 2 MLJ 271, *Honworld Chemicals & Machinery Sdn Bhd dan lain-lain lwn Ketua Pengarah Kastam Malaysia, Jabatan Kastam Diraja Malaysia dan lain-lain* [2017] 8 MLJ 622; [2016] CLJU 1240 and *Lembaga Minyak Sawit Malaysia & Anor v Innovans Palm Industries Sdn Bhd* [2023] 2 MLJ 742; [2023] 3 CLJ 715, all concerned challenges against administrative actions taken by authorities under specific statutory provisions. None of these cases involved challenges to the constitutionality or validity of the underlying provisions of law.

[19] The challenges to the constitutionality of provisions in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; [2018] 3 CLJ 1, *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199 and *Heidy Quah Gaik Li v Kerajaan Malaysia* [2025] 6 MLJ 693, were all challenges to substantive law rather than administrative acts and all the individuals concerned either faced or were facing prosecution in criminal courts.

[20] The civil courts in those cases were not deterred from adjudicating the constitutional validity of the provisions in question nor did such adjudication constitute interference with the criminal proceedings.

[21] Whether the challenge is directed at a substantive or procedural law is only significant for purposes of determining the nature of the constitutional protection and the grounds for judicial intervention, rather than the court's jurisdiction to hear the case.

[22] The Judiciary remains the final arbiter of constitutionality to ensure that both the Executive and the Legislature operate within their respective constitutional boundaries.

[23] For this reason, this courts finds that this court is empowered to determine.

Locus standi

[24] Whilst the defendant did not dispute the plaintiffs' locus standi in instituting this challenge to the provisions, this court is of the view that it would be prudent to address this as a preliminary matter.

[25] In *Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors* [2023] 2 MLJ 296; [2023] 3 CLJ 653, Tengku Maimun CJ held at p 311 (MLJ):

> It must be added, for completeness that the respondents do not dispute the locus standi of the appellants to make this challenge. Regardless, we find that the appellants have genuine interest in this matter sufficiently to clothe them with the locus standi to mount this case. Not only are they public-spirited citizens seeking elucidation on matters affecting public interests but, as practising advocates and solicitors, they have a direct interest on a matter that affects the independence of the Judiciary.

(See also *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 at p 211; [2020] 3 CLJ 593.)

[26] In *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 2 MLJ 150; [2024] 3 CLJ 323, Tengku Maimun CJ, delivering the majority judgment of the Federal Court, held at p 171 (MLJ):

> We therefore take the view that the fact that legislation has been passed creates a factual circumstance in which it can be challenged. Article 4(1), which forms the substantive constitutional basis for all constitutional judicial review cases, does not discriminate between the circumstances and situations in which such challenges can be brought or the categories of persons that can bring them, apart from differentiating between the nature and procedure for those proceedings ie between 'incompetency' and 'inconsistency' challenges.
>
> As explained in *Wong Shee Kai*, 'incompetency challenges' are a specific kind of 'inconsistency challenge' which in addition to being governed by art 4(1), are also governed by art 4(3) and 4(4). There is nothing expressed or implied within art 4(3)

and 4(4) to suggest that anyone who seeks to challenge the constitutionality of a legal provision must first prove his or her reasons per se for bringing the challenge (apart from having to advance arguments on why the provisions they challenge are invalid on grounds stated in art 4(3)).

All citizens (and in some cases all persons) are entitled to rely on the FC for protection and to approach the Federal Court for competency challenge under arts 4(4) and 128 of the Federal Constitution. The passing of a law (whether Federal or State) is a legislative act or conduct which always remain subject to judicial scrutiny in line with the principle of separation of powers. We find no constitutional basis to limit the types of people or category of persons who can at the very minimum, challenge the existence of the law as a separate constitutional cause of action in addition to cases where a person affected by the exercise of such powers against them can also challenge the validity of that same law.

[27] As the provisions in question directly affect the conduct of their pending criminal trial, this court is satisfied that the plaintiffs have a sufficient interest in the subject matter. This actual controversy establishes their standing.

Article 149

[28] Article 149 serves as a powerful enabling provision, empowering Parliament to enact special laws to combat subversion and actions prejudicial to public order. Legislation enacted under art 149 must still comply with art 151. Courts have also determined that art 149 cannot override human rights protections other than those specified in arts 5, 9, 10, and 13.

[29] Article 149 was examined by the apex court in a series of landmark cases including *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177; [2022] 3 MLRA 131, wherein Nallini Pathmanathan FCJ held at p 242 (MLJ):

A perusal and construction of art 149(1) of the FC reveals that the provision is made in the FC for special powers accorded to Parliament to legislate against subversion, organised violence and acts and crimes which are prejudicial to the public as well as emergency powers, which may well be inconsistent with some of the fundamental liberties safeguarded in arts 5, 9, 10 and 13 of the FC. It is therefore a special power that allows for, inter alia, the preventive detention of persons, but in circumstances as specifically provided for in the situations set out in art 149(1) of the FC. It cannot be gainsaid that the very manner of provision of these special powers makes it clear that these powers are to be utilised sparingly and solely within the specified context of the FC and not otherwise.

(See also *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 at p 615; [2021] 1 MLRA 83, *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581, *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi*

Lembaga Pencegahan Jenavah & Ors (Criminal Appeal No 05(HC)-7–01 of 2020(W)) (unreported) at para [1], *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 at p 375; [2022] 5 CLJ 1; [2022] 1 LNS 583, and *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ 851 at p 861; [2024] 2 MLRA 288.)

THE SOSMA

[30] The SOSMA, which was enacted under art 149 came into force on 31 July 2012, upon the abolition of the Internal Security Act 1960 (Act 82). The SOSMA does not create any offence, it prescribes a procedural framework, from the point of arrest to the exhaustion of legal process for security offences.

[31] The preamble of the SOSMA is the foundational statement that justified its existence under art 149 and reads:

> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —
>
> (1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;
>
> (2) *to excite disaffection against the Yang di-Pertuan Agong;*
>
> (3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or
>
> (4) to procure the alteration, otherwise than by lawful means, of anything by law established;
>
> AND WHEREAS Parliament considers it necessary to stop such action;
>
> NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows:

[32] The apex court has recognised that the SOSMA was enacted to combat terrorism. In *Samat bin Yamin v Public Prosecutor* [2023] 4 MLJ 613; [2023] 6 CLJ 1, Rhodzariah Bujang FCJ held at p 623 (MLJ):

> It has already been alluded to in *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] 4 CLJ 701 and it is beyond dispute that the SOSMA's purpose and object is to combat terrorism and s 13 thereof is to ensure that those charged with offences under it would not abscond or interfere with evidence and/or witnesses as rightly submitted by the applicant's counsel ...

(See also *Public Prosecutor v Yazid bin Sufaat & Ors* [2015] 1 MLJ 571 at p 580; [2014] 2 CLJ 670 at p 680, *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] 4 CLJ 701 at p 713, *Siti Noor*

Aishah bt Atam lwn Pendakwa Raya [2018] 6 MLJ 614 at p 626; [2018] 5 CLJ 44 at p 57.)

[33] After its enactment in 2012, to date, the SOSMA had undergone several amendments as follows:

(a) Security Offences (Special Measures) (Amendment) Act 2014 (Act A1472) which came in force from 31 December 2014;

(b) Security Offences (Special Measures) (Amendment) Act 2015 (Act A1487) which came in force from 15 June 2015; and

(c) Security Offences (Special Measures) (Amendment) Act 2024 (Act A1736) which came in force from 3 March 2025.

[34] At the time of its enactment, the First Schedule to the SOSMA only listed the offences under Chapter VI and Chapter VIA of the Penal Code ('the PC'). Subsequently, the following offences were added on to the schedule:

(a) offences under Chapter VIB of the PC and offences under Part IIIA of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670); and

(b) offences under the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770).

[35] Chapter VIB of the PC (ss 130U-130ZC) governs offences relating to organised crime. Section 130V of the PC reads:

> (1) Whoever is a member of an organized criminal group shall be punished with imprisonment for a term *of not less than five years and not more than twenty years.
>
> (2) Until the contrary is proved, a person shall be presumed to be a member of an organized criminal group where —
>
> (a) such person can be identified as belonging to an organized criminal group; or
>
> (b) such person is found with a scheduled weapon as specified under the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (Act 357).

[36] The purpose of the inclusion of Chapter VIB of the PC can be understood from the following Hansards surrounding the Penal Code (Amendment) Act 2012 and the parallel amendment to the SOSMA by Deputy Home Minister, Datuk Dr Hj Wan Junaidi Tuanku Jaafar on:

(a) 23 October 2013:

> Terima kasih Tuan Yang di-Pertua. Tuan Yang di-Pertua, saya mohon

mencadangkan bahawa iaitu Rang Undang-undang Kesalahan Keselamatan (Langkah-Langkah Khas) (Pindaan) 2013 dibacakan kali kedua sekarang. Pada masa ini Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012, digunakan untuk mengambil tindakan terhadap kesalahan-kesalahan dibawah Bab VI, kesalahan terhadap negara. Bab VIA, kesalahan berhubung dengan keganasan di bawah Kanun Keseksaan. Walaupun akta ini baru saja digubal pada tahun 2012, namun terdapat keperluan untuk meminda beberapa peruntukan untuk memasukkan kesalahan-kesalahan keselamatan yang lain bagi memperkukuhkan lagi tindakan yang boleh diambil terhadap penjenayah.

Bab VIB Kanun Keseksaan yang telah digubal pada tahun 2012 mengenai jenayah-jenayah terancang, di mana terdapat dua kesalahan yang telah diwujudkan itu. Kesalahan menjadi anggota kumpulan jenayah terancang yang boleh dihukum sehingga lima tahun penjara dan membantu kumpulan jenayah terancang yang boleh dihukum penjara sehingga 10 tahun. Bab ini juga turut mentakrifkan kumpulan jenayah terancang dan kesalahan serius.

Sehubungan dengan itu, kanun keseksaan juga telah dibuat pindaan selari dengan memasukkan beberapa peruntukan di bawah Bab VIB seperti seksyen baru, 130X, 130Y, 130Z, 130ZA, 130ZB dan 130ZC, untuk mewujudkan kesalahan tambahan seperti melindungi, bergaul, merekrut atau mengambil bahagian dalam kumpulan jenayah terancang serta menerima suapan untuk memudahkan atau memulihkan aktiviti jenayah terancang ...

Tuan Yang di-Pertua jenayah terancang dan sindiket penyeludupan migran ini telah mencapai ke tahap yang boleh mengancam keselamatan negara, kerana telah memberi kesan negatif ke atas aspek sosial, ekonomi dan politik yang merupakan tunjang kepada kestabilan sebuah negara.

Sebagai contoh dari aspek sosial, peningkatan kadar jenayah, aktiviti-aktiviti seperti penyalahgunaan dadah, perjudian, maksiat, pergaduhan di tempat-tempat awam. Lambakan migran akan menjadi benar-benar dan kawasan perumahan tidak aman seperti sedia kala sehingga menjejaskan kehidupan seharian masyarakat.

Dari sudut ekonomi, aktiviti kumpulan kongsi gelap yang bermaharajalela dan kedudukan negara dalam US Trafficking in Persons Report akan menjejaskan keyakinan pelabur asing dan pelabur tempatan. Kadar jenayah beratyang tinggi dan lambakan migran juga akan menyebabkan pelancong asing merasakan tidak selamat dan tidak memilih untuk melancong ke negara ini. Akhirnya, pembangunan ekonomi kita akan terencat dan seterusnya menjatuhkan nilai mata wang negara.

Dari sudut politik pula, terdapat juga kemungkinan kumpulan-kumpulan jenayah terancang untuk mempengaruhi ahli-ahli politik dan pegawai-pegawai kanan kerajaan bagi melindungi kegiatan mereka.

Sekiranya hal ini dibenarkan berlaku, maka institusi-institusi kerajaan akan kehilangan kredibiliti dan kewibawaan dan seterusnya menyebabkan kerugian yang besar kepada negara. Oleh yang demikian,

kesalahan-kesalahan di bawah Bab VIB Kanun Keseksaan, dan Bahagian III A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 dijadikan kesalahan keselamatan dalam Jadual Pertama — Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012.

(b) 24 October 2013:

Mengenai Bab VIB yang dimasukkan ke dalam rang undang-undang ini dibangkitkan oleh Yang Berhormat Padang Serai. Asas kenapa Bab VIB di masuk ke dalam SOSMA, jawapan saya ialah pada masa ini terdapat sebanyak 49 kumpulan jenayah terancam yang beroperasi di seluruh Malaysia yang punyai anggota melebihi 43 orang melakukan jenayah kekerasan, bunuh, 440 kes kumpulan jenayah terancang hingga tahun 2013. Kecederaan terhadap orang awam lebih 6,000 kes pada tahun 2012. Jenayah terhadap harta awam dan persendirian 123,719 pada tahun 2012 yang melibatkan kerugian lebih daripada RM1 bilion.

Ini merupakan satu asas yang kukuh dan melepasi tahap yang ditetapkan dalam mukadimah SOSMA iaitu keterangan bahawa telah diambil dan tindakan lanjut diancam oleh sekumpulan besar orang-orang di dalam dan di luar Malaysia. Satu, untuk menyebabkan keganasan terancang terhadap orang-orang atau harta atau untuk menyebabkan sebilangan besar warganegara takutakan keganasan itu. Jadi kita telah memenuhi syarat itu Tuan Yang di-Pertua.

Aktiviti jenayah terancang telah menyebabkan masyarakat merasa takut akan keganasan itu dan mendesak kerajaan untuk mengambil tindakan tegas untuk mengembalikan keamanan dan keselamatan negara dan harta benda. Statistik yang amat besar ini merupakan kes nyata yang telah melibatkan harta yang amat banyak di kalangan warganegara Malaysia, kumpulan jenayah terancang selalunya beroperasi dengan luas dan mempunyai rangkaian di seluruh negara. Sebagai contohnya kumpulan Geng 08, Geng 04, Geng Tiga Line, Geng Wahki, Geng Seow San Ong mempunyai rangkaian hampir di seluruh negara.

Kumpulan 08 sendiri mempunyai rangkaian hingga ke luar negara. Mereka bukanlah penjenayah setempat dan kumpulan mereka mempunyai rangkaianrangkaiannya. Kumpulan 08 Ipoh dan 08 Simpang Pulai. Di Sabah — Otai, Atap beroperasi di Sabah. Di Sarawak iaitu Sibuti, Krokok beroperasi di Sarawak sahaja. Di seluruh negara kita mempunyai kumpulan 08, 04, Satu Hati, Tiga Line, Double Seven, Geng 36, Geng 3821, Geng Wahki mempunyai rangkaian seluruh negara.

Peringkat negeri Otai dan Atap di Sabah, Sibuti, Krokok Sarawak. Aktiviti mereka ialah pengedaran dadah, peras ugut, kutipan wang perlindungan dan merekrut anak-anak muda menjadi ahli kumpulan jenayah. Apabila berlakunya pergaduhan merebut kawasan operasi dan pengedaran dadah yang berlaku di tempat terbuka seperti yang berlaku di dalam kes-kes berikut. Pertama, Ayer Hitam report 2327/13 bertarikh 20 Julai 2013, pergaduhan antara Geng 08 dengan Geng 04 di Paya Tabung, Georgetown Pulau Pinang

di mana Geng 04 bersenjata parang dan pistol telah menembak mati ahli Geng 08.

Kedua ialah Bestari Jaya report 2080/13 bertarikh 29 Julai 2013 pergaduhan antara Geng 21 Kuala Selangor dengan kumpulan Geng 36 Bestari Jaya. Geng 21 menggunakan pistol dan melepaskan tembakan. Mangsa Geng 36 cedera. Manakala yang ketiga, Kubang Semam report 1811/13 bertarikh 29 Julai 2013 pergaduhan antara Geng 04 dengan Geng 36 di Kulim. Geng 36 telah melepaskan tembakan dan mangsa daripada Geng 04 cedera. Fakta yang dinyatakan jelas membuktikan bahawa ancaman yang dibawa oleh kumpulan jenayah terancang adalah benar dan nyata dan bukanlah khayalan kerajaan semata-mata. Rakyat menyaksikannya di depan mata mereka sendiri.

Kumpulan jenayah terancang ini tidak akan berhenti kegiatan mereka kerana aktiviti jenayah mendapat pulangan yang besar dengan cara yang cepat dan mudah.

Aktiviti mereka akan berterusan sepanjang zaman dan ancaman itu adalah satu ancaman yang kekal.

PRESUMPTION OF CONSTITUTIONALITY

[37] The principles for determining the constitutional validity of a legal provision were laid down by Aboolcader J (as His Lordship then was) in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] CLJU 97. His Lordship held at p 117 (MLJ):

> In considering the matter in issue the principles to be borne in mind are three-fold:
>
> Firstly, there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.
>
> Secondly, the presumption is not however to be carried to the extent or stretched for the purpose of validating an otherwise invalid law, and if the force of art 8(1) bears sufficiently strongly upon and against that presumption, it must then necessarily bend, break and give way under that force.
>
> And thirdly, for this purpose a statute or statutory provision must be examined on its own merits and not by comparison with other similar provisions.

[38] The doctrine of a strong presumption of constitutionality has been consistently held by apex court in several landmark cases. In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526, Zainun Ali FCJ held at p 594 (MLJ):

> The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional

(*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566*, Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389*, Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921). The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid.

(See also *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 MLJ 68 at p 127; [2021] 6 CLJ 1.)

[39] In *Ketheeswaran*, Tengku Maimun CJ held at p 862 (MLJ):

Having said the above, it has not escaped our mind the equally fundamental concept in constitutional litigation that legislation is presumed to be constitutional unless the party alleging invalidity can overcome the heavy burden of demonstrating otherwise ...

INTERPRETIVE PRINCIPLES

[40] This court was mindful that the FC is a dynamic, living document rather than a static text and that it should be interpreted in a manner that remains responsive to contemporary needs and evolving circumstances in the country.

[41] In *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925, Ariffin Zakaria CJM (as His Lordship then was) held at p 298 (MLJ); p 941 (CLJ):

NS Bindra's Interpretation of Statutes, 10th Ed at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p 1296 it stated that the organic method is to be preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.

[42] In *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 1 LNS 437, Richard Malanjum CJ held at p 32 (MLJ):

We begin by acknowledging that in interpreting any constitutional provision such as arts 5 and 8 of the FC, certain principles must be borne in mind.

(a) firstly, it is trite that a constitution is sui generis, governed by interpretive principles of its own;

(b) secondly, in the forefront of these interpretive principles is the principle that its constitutional provisions should be interpreted generously and liberally, not rigidly or pedantically (see: *Dato' Menteri Othman Baginda & Anor v Dato' Ombi Syed Alwi Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28; [1984] 1 CLJ Rep 98); and

(c) thirdly, it is the duty of the courts to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the FC, in order to reveal the spectrum of constituent rights submerged in each article.

(See: *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 at para [8]).

(See also *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at p 340; [2010] 3 CLJ 507; [2009] 1 LNS 1476, *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit* [2014] MLJU 1874; [2015] 2 CLJ 328 at para [10] and [50]).

Article 5 — Liberty of the person

[43] In the context of criminal law, art 5(1), in particular the phrase 'save in accordance with law' encompasses the presumption of innocence and right to fair trial.

[44] This provision was examined in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41 wherein Jeffrey Tan FCJ held at p 28 (MLJ):

> As we see it, the presumption of innocence, sometimes referred to by the Latin expression *ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on the one who declares, not on one who denies), is the principle that one is considered innocent unless proven guilty, and that 'the presumption of innocence, the privilege against self-incrimination and the right to silence are important elements of the 'accusatorial system of justice' which generally prevails in the common law world' (*Lee v New South Wales Crime Commission* [2013] 302 ALR 363 per French CJ). 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law' (*Coffin v United States* 156 US 432 (1895); 15 S Ct 394). That burden of proof on the prosecution was famously referred to as the 'golden thread' in the criminal law by Lord Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1:
>
> > Throughout the web of the English criminal law one golden thread is always to be seen — that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the

common law of England and no attempt to whittle it down can be entertained.

The presumption of innocence is that important that it is explicitly enshrined in many legal codes and constitutions. It is not explicitly included in our legal code or Federal Constitution. But art 5(1) of the Federal Constitution explicitly provides that 'No person shall be deprived of his life or personal liberty save in accordance with law' ...

...

Pertinent to 'law' in the phrase 'in accordance with law', art 160(2) of the Federal Constitution stipulates that 'Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof, with that common law being the common law of England (see art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967). Article 160(2) uses the word 'includes'. Hence, art 160(2) is a non-exhaustive definition. The phrase 'in accordance with law' does not merely refer to domestic law but also to the rule of law (see *R v Lambert* [2001] UKHL 37 at para 150 per Lord Clyde), it includes the doctrine of presumption of innocence, and does not exclude case law, judge made law, legal doctrines established by judicial precedents, or whatever that has the force of law.

(*Ketheeswaran* at p 884.)

[45] On the issue of constitutionality, the legal position remains that a law enacted under art 149(1) is constitutionally valid even if it is inconsistent with art 5.

Article 8 — Equality

[46] In *Datuk Haji Harun,* the learned judge held at p 165:

Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:

1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.

2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of art 8 and within art 153.

3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in clause (4) and 'practice' in clause (5)(b) of art 8.

4. The prohibition applies to both substantive and procedural law.

5. Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para, (b) of clause (5) of

art 8); aborigines as opposed to others (para, (c)); residents in a particular State as opposed to residents elsewhere (para, (d)); and Malays and natives of Borneo as opposed to others who are not (art 153).

6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution oris allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

7. In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia* AIR 1958 SC 538, provided that:

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above ...

As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law. (Minority judgment in *NI Caterers* AIR 1967 SC 1581 and judgment in

M Chhagganlal AIR 1974 SC 2009. We think that we should follow the same principle.

9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. (Per Sastri CJ in *Anwar Ali* AIR 1952 SC 75.

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganlal* AIR 1974 SC 2009.

(See also *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 at p 335; [2016] 4 CLJ 12 and *Ketheeswaran* at 889).

[47] Another aspect of art 8(1) is the principle of proportionality. This principle was explained by the Federal Court in *Alma Nuda* at p 37:

When interpreting other provisions in the FC the courts must do so in light of the humanising and all-pervading provision of art 8(1) (see *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at para 8, approved in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 at para 86; *Lee Kwan Woh* at para 12). Article 8(1) guarantees fairness in all forms of state action (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261). The essence of the article was aptly summarised in *Lee Kwan Woh* at para 12:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (Executive, Legislative or Judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

In other words, art 8(1) imports the principle of substantive proportionality. 'Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved' (see *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* at para 8. The doctrine of proportionality housed in art 8(1) was lucidly articulated in *Sivarasa Rasiah* at para 30:

> ... all forms of state action — whether Legislative or Executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

Accordingly, when any state action is challenged as violating a fundamental right, such as the right to life or personal liberty under arts 5(1) and 8(1) will at once be engaged such that the action must meet the test of proportionality. This is the point

at which arts 5(1) and 8(1) interact (see *Sivarasa Rasiah* at paras 17–19).

This approach is consistent with that adopted in other Commonwealth jurisdictions. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question (see *State v Makwanyane* [1995] 1 LRC 269 at p 316).

(See also *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 at p 317, *Ketheeswaran* at 889.)

[48] The principle of proportionality under art 8(1) exists to ensure that any legislative measure taken is not excessive and is proportionate to the legislative aim. In order to satisfy the principle of proportionality, the law must pass the three-stage test:

(a) there must be a sufficiently important objective to justify in limiting the right in question;

(b) the measure designed must have a rational nexus with the objective; and

(c) the measure used which infringes the right asserted must be proportionate to the objective.

[49] While the courts serve as the primary guardians of constitutional rights, they acknowledge that Parliament; as the democratically elected Legislature, is better positioned to navigate moral and societal issues and the measure of punishments. In these instances, the Judiciary practices judicial deference, stepping back to allow the Legislature to assess society's needs and make difficult choices between competing consideration.

(*Letitia Bosman* at p 323.)

Article 121(1) — Judicial power of the Federation

[50] In *Semenyih Jaya* the learned judge held at p 587:

Judicial power is the power every sovereign state must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give an authoritative decision which is binding (whether subject to appeal or not) is called upon to take action (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 at p 237; [2010] 7 CLJ 397 at p 485).

> Judicial power is best described in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550, as being the power vested in the court to adjudicate on civil and criminal matters brought to it (see also the dissenting view of Richard Malanjum CJ (Sabah and Sarawak) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1).

(See also *Letitia Bosman* at p 300, *Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal* [2023] 6 MLJ 483 at p 505, *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 at p 652).

[51] Judicial power is essentially a power of the court to adjudicate civil or criminal matter brought before it with finality and enforceability. The exercise of judicial power does not begin until the court is call upon to take action. This means that the matter must first be brought before the court and the court must first be given the legal basis or foundation to exercise the power under the law.

[52] Guided by these authoritative pronouncements, this court proceeded to examine the constitutional challenges mounted against the provisions.

MERITS OF THE CHALLENGES

Section 4(5)

[53] Section 4(5) relates to the power of arrest and detention and reads:

> Notwithstanding subsection (4), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation.

[54] The provision essentially authorises a police officer (of or above the rank of Superintendent of Police) to extend the period of detention of a person arrested for security offences up to 28 days, for the purposes of investigation.

[55] A person detained under the extended 28-day period pursuant to s 4(5) retains the constitutional right to apply for a writ of habeas corpus under art 5(2). This judicial remedy serves as a critical check and balance, as Parliament did not abrogate the court's power to inquire into the legality of detention. This is evident from the following Hansards:

(a) 16 April 2012 by the then Prime Minister and Minister of Finance, Dato' Sri Mohd Najib bin Tun Abdul Razak:

> Tuan Yang di-Pertua, menyedari bahawa rang undang-undang ini digubal di

bawah Perkara 149 dan la membenarkan penahanan individu oleh pihak polis untuk tujuan siasatan yang luar daripada norma kebiasaan tatacara jenayah dan undang-undang keterangan yang lazlm, maka kerajaan telah mengambil keputusan mengadakan beberapa lindung jamin atau safe guard dengan izin, seperti berikut.

...

Keduanya, pemansuhan kuasa Menteri Dalam Negeri untuk menahan tanpa perbicaraan mana-mana individu. Fasal 4 rang undang-undang baru ini menyentuh tentang kuasa penangkapan dan penahanan. Di bawah fasal ini, polis mempunyai kuasa khas untuk menangkap dan menahan mana-mana orang yang polis mempunyai sebab untuk mempercayai bahawa orang itu terlibat dengan kesalahan keselamatan. Perlu ditekankan di sini bahawa kuasa penangkapan dan penahanan ini adalah untuk tujuan penyiasatan semata-mata. Orang yang ditangkap dan ditahan di bawah fasal ini boleh ditahan dalam tempoh 24 jam bagi maksud penyiasatan. Walau bagaimanapun, polis boleh melanjutkan tempoh tahanan tidak lebih daripada 28 hari bagi maksud penyiasatan. Selanjutnya, jika polis berpandangan bahawa penahanan lanjut tidak diperlukan selepas 24 jam atau pada bila-bila masa selepas itu, maka orang itu boleh dilepaskan tetapi boleh dipasang dengan peranti pengawasan bagi maksud penyiasatan bagi satu tempoh masa yang tidak melebihi baki tempoh tahanan yang dibenarkan.

Mereka yang ditangkap bebas untuk membuat permohonan habeas corpus di mahkamah dan boleh mencabar alasan tahanan dan tatacara tahanan. Ringkasnya, kuasa semakan kehakiman dikembalikan sepenuhnya kepada mahkamah bukan seperti peruntukan dalam ISA yang menghalang kuasa semakan kehakiman kecuali dalam tatacara tahanan. Berkaitan itu, ingin ditegaskan bahawa kerajaan dan pihak berkuasa akan menghormati apa-apa keputusan yang dibuat oleh mahkamah. Dalam erti kata lain, seseorang yang telah dilepaskan tidak akan ditahan semula atas siasatan kesalahan yang sama.

(b) 17 April 2012 by Dato' Seri Mohamed Nazri Abdul Aziz:

Nanti saya habiskan sekejap. Sikit sahaja. Baik buruknya akta ini kelak bergantung kepada Ketua Eksekutif sesebuah negara. Walau bagaimanapun, balk pun akta yang digubal ia tidak boleh menahan ketelanjuran jika pihak eksekutifnya tidak berhati suci. Safeguard untuk membendungnya ada melalui kuasa semakan kehakiman oleh mahkamah yang tersedia dari awal seseorang itu ditahan di bawah Rang Undang-undang Kesalahan Keselamatan (Langkah-Langkah Khas) 2012. Writ of habeas corpus boleh difailkan di Mahkamah Tinggi untuk mencabar tahanan itu dari segi sebab substantif penahanan itu mahupun dari sudut tatacara tahanannya. Tidak ada ouster clause seperti dalam ISA ...

[56] While s 4(5) allows for specialised security detention by the authority, without a prior remand order from a magistrate, the detenus are not left without recourse; their fundamental right to seek a writ of habeas corpus under

art 5(2) remains intact.

[57] Through the habeas corpus proceedings, the judiciary maintains judicial oversight, by reviewing whether the detaining authority has strictly complied with all procedural and constitutional requirements despite the absence of immediate remand hearings.

(See also *Subramaniam a/l Batumalai v Ketua Polis Negara* [2019] MLJU 1713, *Rosli bin Sahak dan satu lagi lwn Ketua Polis Negara* [2022] MLJU 952; [2022] CLJU 991.)

[58] In *Tanasilan a/l Nakethiran v Public Prosecutor & Ors* [2023] MLJU 995, Noorin Badarudin J (as Her Ladyship then was) held at para [32]:

> Unlike the POCA, there is no bar to judicial scrutiny under the SOSMA. Under the SOSMA, the right to question the legality of such detention under sub-s 4(5) is neither taken away nor suspended. This is in line with the constitutionally embedded right under art 5(2) of the FC. The fundamental characteristics or features, or basic structure of the FC is being complied with, as should the doctrines of proportionality and equality embodied in art 8 of the FC which also agnates with international law on according all detainees the right of judicial redress. In fact, the constitutional guarantee of the detainee's right under art 5(2) of the FC cannot be said to be abrogated totally although the SOSMA is enacted under art 149 of the FC. As such, a detainee preventively detained under the SOSMA could apply for release under the provisions of art 5(2) of the FC.
>
> ...
>
> Once the remedy of the writ of habeas corpus is available by reason of art 5(2) of the FC it is incumbent upon a High Court to inquire into the legality of the detention. Liberty and security are therefore reconcilable within the constitutional order that upholds the rule of law. There is an element of accountability in detaining a subject under sub-s 4(5) of the SOSMA for purposes of investigation. The need for a check and balance mechanism by the courts as the final arbiter between the individual and the state to avoid the risk of abuse by the executives and to ensure that the rights and personal liberty of an individual is safeguarded in tandem with the rights and interest of the public cannot be said to have been taken away by sub-s 4(5) of the SOSMA.

[59] This court finds that although s 4(5) is inconsistent with the procedural safeguards in art 5(4); which requires an arrested person to be produced before a magistrate within 24 hours, this inconsistency did not render the provision unconstitutional or invalid. As a law enacted under art 149(1), such inconsistencies are expressly provided for.

[60] This court finds that there is no removal of judicial oversight. A detenu can mount a challenge on the legality of his detention past the 24 hours, by way of a habeas corpus application under art 5(2).

[61] The plaintiffs' reliance on *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486 is unfounded as those cases did not involve challenges to the constitutionality of the provision enacted under art 149(1) as being inconsistent with art 5(4).

[62] This court finds that s 4(5) is both proportionate and rationally connected to the SOSMA's objective of addressing security threats. The 28-day detention period does not violate the principle of equality under art 8(1).

[63] The power and authority to detain a person for investigation purposes is not exclusively a judicial function. This power is inherently an executive function that flows from the state's authority to effect an arrest. Article 5(4) explicitly provides for the initial detention for up to 24 hours post-arrest before judicial intervention is typically mandated. This clearly establishes that detention for purposes of investigation is a valid exercise of executive authority.

[64] The power to detain for the purpose of investigation only becomes judicial power exercisable by the court when the detenu is brought before court and the court is called to grant a remand order for the same purpose.

[65] It cannot be said that s 4(5) abrogates judicial power merely because at the investigation stage, the court is not called upon to act. The case on point is *Tanasilan* wherein the learned judge held at para [25]:

> It is apposite to note that unlike the Dangerous Drugs (Special Preventive Measures) Act 1985, SOSMA is not a law that allows for detention without trial. Pursuant to sub-s 4(5) of the SOSMA, the detenu must be either be brought to court for a charge to be preferred against him or be released within 28 days. Nonetheless, given that it is a special law that is enacted to provide for special measures relating to security offences for the purpose of maintaining public order and security and all connected matters as per the title and preamble, the executive is legally authorised by SOSMA to exercise the power of detention for purposes of investigation. So, it cannot be gainsaid that the executive detention under sub-s 4(5) of the SOSMA lack legal authorisation and therefore prohibited because there is in existence such powers clearly prescribed under the law ie the SOSMA, which is enacted pursuant to art 149 of the FC.
>
> In searching whether to grant detention or the extension of the detention is solely a judicial power, this court is of course assisted by binding precedents. What is judicial power has been elucidated in the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311.
>
> ...
>
> It is therefore clear that judicial power comes into existence once it is being called upon to take action ...
>
> ...

> The question now is, does the power given to the executive under sub-s 4(5) encroached/trespassed the judicial power? This court is of the considered view that the answer is in the negative. In the first place, the court is not called upon to take action at the investigation stage under the provision ...

[66] As alluded to earlier, the judicial scrutiny of this extended detention is invoked when the detenu files a habeas corpus application.

[67] For these reasons, this court is satisfied that s 4(5) is constitutional and valid and does not fall foul of arts 5, 8 or 121.

Section 13

[68] Section 13 relates to bail and reads:

> (1) Bail shall not be granted to a person who has been *charged with a security offence.*
>
> (2) Notwithstanding subsection (1) —
>
> (a) a person below the age of eighteen years;
>
> (b) a woman; or
>
> (c) a sick or an infirm person, charged with a security offence, other than an offence under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act),
>
> may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[69] This provision effectively imposes a blanket prohibition on granting bail to an accused person charged with a security offence, subject only to a few strictly defined exceptions.

[70] The rationale behind s 13(1) can be found in the Hansard dated 17 April 2012 wherein Dato' Seri Mohamed Nazri Abdul Aziz said:

> Tuan Pengerusi, saya amat memahami apa yang dimaksudkan oleh Yang Berhormat daripada Sungai Siput tetapi daripada awal lagi saya sudah mengatakan iaitu bahawa mereka yang dituduh di atas kesalahan di bawah rang undang-undang yang sedang kita bahaskan ini, ia merupakan kesalahan keselamatan yang cukup serius. Jadi ia tidak boleh dilihat daripada segi keadaan biasa. Saya sebutkan sebentar tadi iaitu dalam keadaan biasa, criminal offences dibolehkan tetapi ini kesalahan keselamatan, very serious.
>
> Walau sekalipun kita boleh mengenakan bail, satu juta, dua juta katalah, tetapi dalam masa dia berada di dalam bail, dia boleh menghilangkan diri dia atau pun dia boleh di luar menghapuskan segala apa juga keterangan yang mungkin ada atau pun dalam ketika dia di bail itu kerana dia merupakan pengganas yang komited dengan apa yang difikirkan perjuangannya itu betul. Dia akan melakukan lagi perkara yang

mungkin mendatangkan satu perkara yang lebih besar seperti pembunuhan lagi ke atau pun letupan dan macam-macam. Kita tidak boleh mengambil risiko ini. Kita boleh menggeleng kepala Yang Berhormat, kalau sekiranya bukan keluarga kita yang terlibat dalam menjadi mangsa dan apa-apa perkara yang dilakukan oleh pengganas.

Akan tetapi jika sudah berlaku sesuatu seperti kehilangan nyawa dan selepas itu barulah kita hendak memperketat lagi undang-undang, orang akan marah kepada kita. Ini kerana seperti mana yang disebutkan oleh Yang Berhormat Pasir Mas tadi, undang-undang ini merupakan juga preventive, menghalang daripada satu perkara yang kemungkinannya besar boleh berlaku daripada berlaku. Oleh sebab itu saya ingin menyatakan di sini iaitu kita mahu supaya fasal 13 dikekalkan seperti sedia ada dan kita tidak bersetuju dengan pindaan yang dicadangkan oleh Yang Berhormat Sungai Siput.

[71] In *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675; [2020] 2 CLJ 818, Kamardin Hashim JCA held at p 684 (MLJ):

> Melalui pembacaan kami, peruntukan di bawah s 13 SOSMA cukup jelas melalui seksyen-kecil (2) bahawa peruntukan itu bukanlah satu halangan secara total terhadap jaminan. Sebaliknya, kami berpandangan peruntukan s 13 SOSMA tidak ubahnya sama seperti peruntukan di bawah s 388 KTJ. Apa yang membezakan hanyalah kekecualian terhadap pemakaian peruntukan itu diberikan kepada tiga kategori orang yang sama di bawah proviso bagi s 388(1) KTJ. Manakala bagi SOSMA, kekecualian itu terdapat di bawah seksyen-kecil (2), s 13 SOSMA. Oleh itu, pandangan kami jaminan masih boleh diberikan kepada tertuduh yang dipertuduhkan dengan kesalahan keselamatan sekiranya syarat-syarat yang diperuntukkan di bawah seksyen-kecil (2) dipenuhi. Oleh itu juga, s 13 SOSMA bukanlah peruntukan yang sememangnya tidak boleh diberi jam in (*unbailable*). Dengan kata lain, kesalahan-kesalahan keselamatan (*security offences*) adalah kesalahan yang terjumlah kepada kesalahan 'non-bailable' di mana mahkamah masih mempunyai budi bicara untuk membenarkan tertuduh dilepaskan atas jaminan sekiranya syarat-syarat di bawah seksyen-kecil (2) dipenuhi.

[72] The prohibition of bail does not displace the presumption of innocence enshrined in the FC, for the simple reason that the accused's guilt or innocence has yet to be determined by a court. Bail is refused because of the inherent seriousness of the security offence with which the detenu is charged and to prevent flight risk, destruction of evidence or intimidation of witnesses.

[73] This court finds that the constitutionality validity of s 13 remains preserved by virtue of art 149(1) which expressly provides that any provision of law enacted pursuant to art 149(1) is valid notwithstanding that it is inconsistent with art 5.

[74] This court is satisfied that s 13(1) does not violate the principle of proportionality under art 8(1) on the strength of the following authorities:

(a) *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270, wherein Collin Sequerah J (as His Lordship then was) held at 576 (MLJ):

> The SOSMA being enacted pursuant to art 149 of the FC allows laws to be passed with the objective of preventing action which is prejudicial to public order in, or the security of, the Federation or any part thereof notwithstanding that these laws are inconsistent with any of the provisions of arts 5, 9, 10 or 13 all of which relate to fundamental liberties.
>
> No doubt art 8 is not listed as one of the fundamental liberties that may be restricted pursuant to any laws passed under art 149.
>
> Notwithstanding, it can quite clearly be seen that there is a reasonable co-relation between the preamble to the SOSMA, one of which is to combat action prejudicial to public order in, or the security of, the Federation or any part thereof and the similarly desired objective envisaged by art 149(1)(f) in particular.
>
> Therein therefore lies the rationale and the justification for the difference in the treatment of the various classes of persons described in s 13 of the SOSMA. To put it another way, the curtailment of freedom by the absolute prohibition of bail in s 13 is not out of proportion to the object to be achieved namely, the prevention of action prejudicial to public order in, or the security of, the Federation or any part thereof.
>
> This exercise necessarily involves a balancing of different rights and interests and in this regard, it is apposite to cite the following passage in *Alma Nudo Atenza*: ...
>
> It surely cannot be seriously disputed that acts of terrorism in general have the capacity to occasion grievous harm and potential damage and loss both to property, life and limb.
>
> This is the very reason why preventive and not reactive action ought to be taken to address such risks. To take an extreme but not so far-fetched example, imagine the consequences, if explosives were to be placed in a shopping mall with the intention that it would be set off.
>
> Do the authorities then wait until much loss of life is occasioned and then endeavour to apprehend the offenders and revoke their bail previously given? To do so would be to proverbially close the stable doors after the horses have bolted. If this is not to be the case, the Legislature must surely be empowered to pass laws designed to avert such tragedy from occurring.
>
> The particular objective to be achieved is therefore not out of proportion to the state action taken which is to prevent possible terrorist related acts by the absolute prohibition of bail. After the carrying out of a balancing exercise between the individual right of the accused and the greater good of the public at large it was necessary in all the circumstances for Parliament to pass such a law. There is also a clear rational nexus between the relevant state action with the objective to be achieved.

A

...

I therefore find under all the circumstances that the enactment of s 13 of the SOSMA passes the ultimate test of proportionality and does not offend the principle of equality enshrined in art 8 of the FC and is consequently not ultra vires art 8 of the FC.

B

(See also *Yanasegar a/l Vadivelu & Ors v Public Prosecutor* [2022] MLJU 3235); and

(b) *Samat bin Yamin* wherein Rhodzariah Bujang FCJ held at p 628 (MLJ):

C

As cited by the learned SFC in his written submission and mentioned in passing by us earlier, there is cogent evidence from the study conducted by an august international body, no less than the United Nations, which justifies the legislative intent in our case to allow a woman charged under SOSMA to be on bail ... It is also worth reproducing another report, though not internationally done, by the Law of Justice Commission of Pakistan, also cited by the learned SFC, which justifies the release of a woman on bail pending trial ...

D

Although we do not have the statistics to back us up, but we could confidently state that in all of our years with the Judiciary, a female accused jumping bail is not as common an occurrence as that of a male accused. So, we could fully appreciate where the views expressed in the above-mentioned reports came from and the rationality of the same. Obviously, the discrimination based on gender here is in our view both reasonable and permissible because it satisfies the two conditions laid down *Datuk Haji Harun*'s case which is, that it is founded on an intelligible differentia and there is a rational nexus between the object of the SOSMA which is clearly enacted for the prevention of acts prejudicial to public order and security of our nation or any part thereof as rightly stated by Collin Sequerah J (as His Lordship then was) in *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 and the denial of bail to a person charged for any offence covered by it.

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As for the other leeway given to those below the age of 16 years, the rationality of this exception stares in our face for it is plain that there a special law governing juveniles accused for crime which is the Child Act 2001 and before that, its predecessor, the Juvenile Court Act 1947. As for a sick and infirm person, that too is beyond reproach because for one, it can safely be assumed that given the medical conditions suffered by such an accused person, there would be a very much lesser risk of perpetuating the danger we mentioned above if freedom before and during trial is granted. Of course, the law does not specify exactly the extent and severity of the illness and infirmity which allows the granting of the said leeway, but again with the object of the SOSMA in mind, it cannot be that any illness be a ground to exercise that right to bail for surely the severity of the medical conditions plays a major role in the court's consideration should an application be made on the said grounds. Thus, it is for the court to determine, based on the degree of the illness the accused person and the infirmity he suffered, backed no less by a conclusive medical evidence, that it would be just and fair for the person so charged to be freed on bail whilst awaiting the conclusion and decision of the

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court on the charge so preferred against him ...

In respect of the doctrine of proportionality which is the other ground relied on by the applicant, again we are thoroughly convinced that the test prescribed by *Sivarasa*'s case which is reiterated in *Alma Nudo*'s case as highlighted by both the learned counsel and the learned SFC, respectively, have indeed been satisfied here given the very object of the SOSMA and what it aims to achieve for the security and peace of our nation as per the winding speech of the said Minister when tabling the Bill for it which the learned SFC had drawn our attention to as stated in p 20 of this judgment. The same needs no repetition here but we would just like to re-emphasise that what we are here concern with is the whole peace and security of our nation, not just a segment of it and that it is an undeniable right, which every citizen in country expects and must enjoy. There is more than enough worldly historical events which demonstrate the extremely devasting effect on a nation when such peace and security are destroyed which we need not have to go into. Thus, the harshness of the law on the freedom of a person charged under the SOSMA is one, which is militated and justified by the very aim that the said law is promulgated.

[75] The power to grant bail is not an exclusively judicial power; it is shared with the police as they too have the authority to grant bail pending investigation. This is evident from ss 387, 388, and 390 of the Criminal Procedure Code (Act 593), which confer the authority to grant bail to both the police and the courts for ordinary criminal offences.

[76] In *Inspector Yusof Hj Othman & Ors v Kwan Hung Cheong* [2018] supp MLJ 224, Raus Shariff FCJ (later CJ) held at p 233:

The provisions relating to the release of an accused person after arrest on bail are found in ss 29, 387 and 388 of the CPC.

Section 29 of the CPC is the general provision which emphasises that upon the accused person being arrested by a police officer he can only be released on his own bond or under an order in writing of a magistrate or a police officer not below the rank of inspector. Section 387 of the CPC relates to a specific provision whereby an accused person may be released on bond or bail in a bailable offence. It is clearly provides that if the arrested person is prepared to give bail, he must be released on bail either by the officer in charge of the police station where he is under arrest or detention or by the court before whom he appears or is produced.

Section 388 of the CPC is the other specific provision relating to bail. It relates to a non-bailable offence ie, where an accused person is arrested without a warrant. In the present case, the applicable s is s 388 of the CPC as the plaintiff was arrested without a warrant by the police officer on suspicion or accused of committing of house-trespass or house-breaking, which is a non-bailable offence.

...

It is significant to note at this juncture that the trial judge had rightly ruled that the

power to grant bail under s 388 as in ss 387 and 29 of the CPC is given both to the police officer as well as the court.

...

To me, there is strong basis for the complaint. This is because there is nowhere in s 388 of the CPC which limits the power of the police officer to issue police bail only before the accused person is detained under s 117 of the CPC. It is my view that s 117 of the CPC is a specific provision relating to a detention of an accused person by a magistrate for the purpose of police investigation. The section makes no mention of the magistrate having the power to grant bail. Section 117 of the CPC operates independently of s 388 of the CPC. In essence, ss 117 and 388 of the CPC deal with two separate situations. As stated earlier, s 117 of the CPC deals with detention of an accused person after arrest while s 388 of the CPC deals with the release of an accused person after arrest.

...

It usually occurs that Investigation could not be completed within the detention period granted by the magistrate under s 117 of the CPC. Section 388 of the CPC is there to assist the police. It empowers the police to release the accused person on police bail, while the investigation is still in progress. Thus, it is my respectful view that the trial judge had erred in deciding that the power of the police officer to release any person accused of a non-bailable offence under s 388(1) of the CPC is only exercisable before the accused person is produced before a magistrate under s 117 of the CPC. Section 388 of the CPC makes no such provision. Neither does such a provision under s 117 of the CPC exist. Thus, to uphold the decision of the trial judge on this issue will have the effect of defeating the intent and purpose of s 388 of the CPC.

Based on the above reasoning, it is my view that question 1 should be answered in the positive. It means that it is lawful for the police to issue a police bail under s 388(1) of the CPC against the accused person who has been released by a magistrate after a detention under s 117 of the CPC.

...

The section uses the words 'the police officer or court' and 'as the case may be' and this clearly indicate that the power to release a person on bail is given to the court as well as to the police officer. Thus, if an accused person is admitted to bail by an officer of a police station, the officer can require him to execute a bond with one or more sureties binding him to appear before the officer at the police station from time to time.

[77] This court is satisfied that s 13(1) does not displace judicial power exercisable by the court. Unlike s 13(2), the court is simply not called upon to act under s 13(1) and there is no legal basis or foundation for the exercise of judicial power to grant bail under that provision.

[78] This court's finding finds support in the judgment in *Suresh Kumar* wherein the learned judge held at p 564 (MLJ):

It is axiomatic that law does not exist in a vacuum. It must rest upon a sure

foundation. My learned brother's judgement in Saminathan a/l Ganesan proceeded from the premise that the power to consider the grant or refusal of bail is an exercise of judicial power.

In doing so, he relied on the decision of Zakaria Yatim J (as he then was) in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where the term judicial power' was discussed as follows ...

The above decision in *Dato' Yap Peng* was later affirmed by the then Supreme Court. It is apposite to examine the two cases cited in *Dato' Yap Peng* relating to the power to grant or refuse bail to an accused person. In the case of *Chinnakarappan v Public Prosecutor* [1962] 1 MLJ 234, it was held that a magistrate had no power to grant bail in cases punishable with death or life imprisonment and that the magistrate in refusing to grant bail had exercised his discretion properly. The relevant provision under consideration there was s 388(1) of the Criminal Procedure Code ('the CPC) and the Criminal Justice Ordinance.

Similarly in *Public Prosecutor v Latchemy* [1967] 2 MLJ 79 the issue under consideration was the provision where the court should not grant bail to a person charged with an offence punishable with death except where certain exceptions apply, the relevant provision being s 388(1) of the CPC. It was held that in deciding whether the exceptions applied, the discretion should be exercised sparingly and judiciously.

...

It will be noticed here that there is given to the court the foundation to exercise a discretion namely, whether or not to grant bail to the categories of persons stipulated within the proviso notwithstanding that there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

The two cases cited in *Dato' Yap Peng* dealt with the judicial discretion or judicial powers exercisable under s 388(1) of the CPC.

It is in this context that the reference to the exercise of bail as a judicial power in *Dato' Yap Peng* must be appreciated. In other words, s 388(1) of the CPC provided the foundation for the exercise of the courts judicial power and accordingly its discretion in respect of the grant of bail.

But what if there is no power altogether given to consider bail or in other words there is simply no discretion to exercise in the circumstances?

To put it yet another way, can the court pronounce on the constitutionality of a legislative provision where there is no foundation or basis laid for the exercise of judicial power?

...

It is seen from the above passage that in defining the phase judicial power', it was held that the exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision is called upon to take action.

This power must accordingly derive its source from somewhere for example, an Act of Parliament although this not the sole source. Hence my earlier observation that

law cannot exist in a vacuum. It is also necessarily follows that the exercise of a discretion can only begin where such discretion has been accorded in the first place.

The point I am making here is that the exercise of judicial power does not begin until and unless the court is called upon to do so. In s 13 of the SOSMA concerning persons charged with offences relating to terrorism, the court is simply not called upon to take any action.

This is because the foundation or substratum for the exercise of that power is not there in the first place. It is axiomatic therefore that a substratum of laws must first exist before the edifice of judicial authority may be erected thereupon. Otherwise, the question of removing judicial power does not arise.

Therefore while I agree with my learned brother in Saminathan Ganesan that the principle enunciated in *Semenyih Jaya* is that any legislation that seeks to remove from the courts any judicial power cannot be countenanced as this would be wholly inimical to the doctrine of the separation of powers, I respectfully differ that such judicial power exists where there is no substratum or foundation laid for the exercise of such power.

Under all the circumstances, I find that there was no basis or foundation for the exercise of judicial discretion in respect of bail in the case of those persons charged with offences relating to terrorism under s 13 of the SOSMA.

[79] For these reasons, this court is satisfied that s 13 is constitutional and valid and does not fall foul of arts 5, 8 or 121.

Sections 14–16

[80] The special provisions relating to protected witness are as follows:

(a) s 14 relates to evidence of witness given in a special manner and reads:

(1) Notwithstanding Article 5 of the Federal Constitution and section 264 of the Criminal Procedure Code, where at any time during the trial of a security offence, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the court for the procedures in this section to apply.

(2) For the purpose of satisfying itself as to the need to protect the identity of the witness, the court shall hold an inquiry in camera by questioning the witness concerned or any other witness in the absence of the accused and his counsel.

(2A) The court shall notify the prosecution of its decision to protect the identity of the witness within seven days of the inquiry.

(2B) Within seven days of the decision, the prosecution may appeal against a refusal by the court to protect the identity of the witness.

(3) If after such inquiry the court is satisfied as to the need to protect the

identity of the witness, the evidence of such witness shall be given in such manner that he would not be visible to the accused and his counsel, but would be visible to the court; and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.

(4) The court may disallow such questions to be put to the witness as to his name, address, age, occupation, race or other particulars or such other questions as in the opinion of the court would lead to the witness's identification.

(b) s 15 relates to identification by witness where evidence is taken in camera and reads:

If in the course of taking evidence under section 14 the accused or any other person is required to be identified by the witness who gives evidence in the manner provided in that section, such identification may be made by the witness through an interpreter or other officer of the court.

(c) s 16 relates to protection of witness' identity and reads:

(1) Notwithstanding any written law to the contrary, any report through any means on a protected witness shall not reveal or contain —

(a) the name;

(b) the address;

(c) the picture of the protected witness or any other person, place or thing which may lead to the identification of the protected witness; or

(d) any evidence or any other thing likely to lead to the identification of the protected witness.

(2) Any person who prepares a report in contravention of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and also to a fine not exceeding ten thousand ringgit.

[81] Section 3 provides the definition of 'protected witnesses' to mean a witness whose exposure would jeopardize the gathering of evidence or intelligence or endanger his life and well being.

[82] *Public Prosecutor v Hassan bin Hj Ali Basri* [2014] 7 MLJ 153; [2014] 2 CLJ 72, demonstrates the operation of these provisions. Ravinthran Paramaguru J (as His Lordship then was) held at p 162 (MLJ):

Section 14 of the SOSMA provides for the giving of evidence by a witness in a special manner to protect his or her identity.

A protected witness would not be seen or heard by the accused or his counsel. Under s 14(2) the court is required to hold an inquiry in camera by questioning the witness

A concerned or any other witness in the absence of the accused and his counsel for the purpose of satisfying itself as to the need to protect the identity of the witness. Upon determination by the court that a witness is in need of protection, sub-s 14(3) and 14(4) would operate to prevent the disclosure of the identity of the witness ...

B Prior to the commencement of the trial, upon the application of DPP under s 14, I held an inquiry in camera and granted 'protected witness' status to two prosecution witnesses who were thenceforth known as Protected Witness No 1 (PW1) and Protected Witness No 2 (PW2). My ruling is recorded in the notes of proceedings at p 3 as follows:

C > Court: I have conducted inquiry under section 14 on two proposed protected witnesses who I shall refer to as Protected Witness 1 and 2.1 did not record their names in the notes of proceedings as that would defeat the purpose of the application. Their names correspond to Protected Witness 1 and 2 as recorded in the Investigation Papers. I hereby order the DPP to make such a note in the IP. I am satisfied that the said two witness are in need to protection under section 14.

D I deliberately did not record the questions I posed to the witnesses or their answers during the inquiry in the notes of proceedings as that could give clues to their identity. It should be noted that even during cross-examination, questions that could lead to the identification of a protected witness are barred (see s 14(4) of the SOSMA). When the protected witnesses gave evidence, they were not visible to the E accused and his counsel. The protected witnesses had been placed in a secured room in the court premises. The secured room was connected to the open court via a video and audio link. The video images were displayed only on the computer screen of the judge. The audio link was made available to the judge, DPP and the court interpreter. The questions of the DPP and counsel for accused were posed to the F protected witnesses through the court interpreter who relayed the questions through the audio link to the protected witnesses. The answers of the witnesses were also relayed back to the court through the same manner. This procedure was adopted in order to comply with s 14(3) that I reproduced above.

G ...

During cross-examination, PW1 denied that he only told the accused about the imminent entry of illegal immigrants and not about intrusion of the 'Royal Sulu Force'. PW1 also denied that he had given national security related information to two other police officers, ie, Tuan Yusry and Inspector Syazwan and that he wanted H to make the accused a scapegoat. I find that PW1 had given credible evidence about the information that he passed to the accused. Although he is a 'protected witness' under the SOSMA, counsel for accused had full opportunity to cross examine him through the court interpreter. He answered all questions confidently and without hesitation. I cannot think of any reason why he would want to incriminate a police officer such as the accused. There was no suggestion put to him that he had I underlying reason to fabricate evidence. PW1 appeared to have no motive at all to do so. Furthermore, he stood up well to cross examination.

(See also *Public Prosecutor v Atik Hussin bin Abu Bakar and other cases* [2016] MLJU 968 at para [11].)

[83] The procedure under these provisions can be summarised as follows:- A

(a) the court holds a private hearing (*in camera*), attended only by the witness and an interpreter, to confirm the necessity of protecting the witness's identity;

(b) the protected witness gives evidence via video link, making them visible and audible only to the court; B

(c) both the prosecution and defense counsel can ask questions, either directly or through an interpreter, and the witness answers via the interpreter; C

(d) the accused's counsel retains the full right and opportunity to cross-examine the protected witness; and

(e) the court remains duty bound to thoroughly evaluate and assess the credibility of the evidence provided by the protected witness. D

[84] To determine if a trial is 'fair', the court looks at the entire process rather than isolated technical rules. The core requirement is that both sides have the opportunity to contest each other's evidence. Even if a specific right — such as the ability to see a witness during cross-examination — is limited, the trial remains fair as long as the accused still has effective means to challenge the case and exonerate himself. E

[85] In *Ketheeswaran*, the appellants sought to challenge the constitutionality of s 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) ('the ATIPSOM'). F

[86] The Federal Court ruled that although s 61A of the ATIPSOM completely excludes the cross-examination of a witness who has provided a deposition, it does not violate the right to a fair trial. This is because the accused still retains the fundamental right to call rebuttal evidence and to challenge all prosecution evidence, including the depositions themselves. G

[87] The apex court confirmed that the right to cross-examine was not absolute, provided the overall trial process allowed the accused a meaningful way to defend themselves and establish their innocence. H

[88] The learned CJ reasoned at p 884: I

> Article 5(1) guarantees the right to life and personal liberty. This right, can however be abridged by law. And thus, in a regular criminal trial (unlike in most civil trial), the fair trial rights gain more visibility because the prosecution which represents the State has a greater leverage than the accused.

A One of the defining features of the right to a fair trial is the concept of 'equality of arms'. The prosecution has at its disposal the police which in turn have powers of search and seizure. 'Equality of arms' seeks to level the playing field such that the accused/defence is not disadvantaged purely by virtue of him not being institutionally powerful. This principle of equality of arms was expressly recognised B and endorsed by this court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 ('Anwar bin Ibrahim'), at para [51].

For these reasons, the general concepts in criminal law are given their due place such as the presumption of innocence, that the prosecution must prove its case beyond a reasonable doubt, that where an inference of fact is made, it should be done in a C manner most favourable to the accused and among other things, that the accused can retain the right to remain silent without having an adverse inference made against him. These and other broader principles collectively constitute the facets of the right to a fair trial and as regards this right, it must be gleaned from whether as a whole, the criminal trial was compromised to the extent that the trial as a whole D was unfair.

...

What is clear from the above passage is that even internationally, it is recognised that certain deviations are allowed in criminal proceedings if the deviations can be justified on objective grounds. In the instant case, this deviation is in relation to E offences under the ATIPSOM and that too only in a specific case relating to the inability to locate the victims stemming from their lawful deportation. As stated by the HRC 'each side be given the opportunity to contest all the arguments and evidence adduced by the other party' and this is the central feature of the right to a fair trial, not the individual mechanical aspects of it.

F ...

It is our understanding that the principle in every case is that in light of the need to balance foremost the interests of the accused and then the interests of the victims and public interest, greater emphasis ought to be accorded to the substance of the trial than to its form. Cross-examination is not only about the fact of it enabling the G questioning of adverse witnesses. What should be appreciated about the process is that it allows the accused to challenge evidence put against him and to put to the prosecution his version of the facts or even his entire defence or parts of it. In certain cases, the putting of the defence dispels any later notion that the defence is a sham or an afterthought. Hence, even if one right is missing in form, what remains of paramount significance is that the accused must at all times retain the means to H challenge the case against him with a view to exculpating himself.

...

In assessing whether the right to a fair trial has been curtailed, the court cannot be too focussed on piecemeal arguments that allege that a trial is unfair because certain I features in a trial are missing as compared to other ordinary trials. In other words, the court cannot lose the forest for the trees. The ultimate question is whether the exclusion of a procedural right has overridden the 'equality of arms' between the prosecution and the accused, and whether the trial as a whole has been unfair resulting in a miscarriage of justice to the accused. The mere fact of the absence of cross-examination without any attendant indication of any miscarriage of justice or

that the right to defend oneself has been jeopardised in any material way, is in our view, insufficient to lead to the conclusion that the accused's right to a fair trial has been violated.

In our analysis and interpretation of s 61A earlier, we have concluded that it was enacted for the legitimate purpose of allowing the admission of ATIPSOM victims who have been lawfully removed from the country. Given these considerations, even the prosecution, after recording the depositions, is unable to further question the witnesses in court by way of evidence-in-chief.

It was also seemingly suggested that the prosecution can always wait for a witness to be deported and then rely on their s 61A deposition as conclusive evidence thereby avoiding the need to examine and cross-examine that witness in court. We have established that this interpretation is misplaced. It appears to us to be more logical that given that the prosecution is not released by s 61A from its prosecutorial burdens, it would be more advantageous to the prosecution to call the witness directly or even rely on s 52's method of examination. The evidential advantage accorded to them is therefore only to the extent of being able to preserve evidence and to tender it as secondary evidence of the charge. We do not at all consider the 'equality of arms' between the prosecution and the accused disrupted in any way.

The fact remains that 'prima facie evidence' as interpreted earlier means that the evidence can be admitted and believed at face value but the accused at all material times retains the right to call rebuttal evidence. He retains also the right to challenge all the other evidence put against him including the depositions that are adduced pursuant to s 61A.

...

In the circumstances, we find that s 61A is objectively fair given the unique circumstances presented by ATIPSOM cases which involve foreign victims who are brought into the country via illicit means. The ATIPSOM regime in some respect, gives these victims' human rights some level of primacy by facilitating, in appropriate cases, their speedy return home via deposition orders. A balance is therefore struck by enabling the taking of their evidence without letting such victims languish, pending trial. A balance is also struck in the public interest in that the prosecution gains an evidential advantage in terms of the deposition. Yet, at the same time, the accused is allowed every latitude to question and challenge the evidence in the deposition by calling rebuttal evidence and to otherwise cross-examine all the other prosecution witnesses.

Thus, insofar as the right to a fair trial is concerned, it is our view that s 61A has fairly triangulated the rights of the accused, the victims and public interest. In the circumstances, and for the reasons explained above, we concur with the respondent that s 61A is not violative of art 5(1) and the appellants' arguments in relation to this are rejected.

[89] Guided by the reasoning in *Ketheeswaran*, this court finds that the plaintiffs' right to a fair trial is preserved because they still retained their right to cross-examine the protected witness during the trial. There is no constitutional or procedural violation.

[90] This court finds that the constitutionality validity of ss 14–16 remain preserved by virtue of art 149(1) which expressly provides that any provision of law enacted pursuant to art 149(1) is valid notwithstanding that it is inconsistent with art 5.

[91] This court finds that these provisions which are only applicable to security offences under the SOSMA and only in respect of prosecution witnesses are not discriminatory.

[92] The basis of this intelligible differentia rests on s 3, which addresses potential jeopardy to evidence collection, intelligence gathering, and/or the safety and lives of those involved. This basis also has a rational connection to the legislative aim of SOSMA.

[93] In *Atik Hussin*, Stephen Chung J (as His Lordship then was) held at para [11.29]:

> In this trial, this witness and other protected witnesses would be testifying against the accused persons, most of them have been charged for being members of a terrorist group and for waging war against the King. These are very serious charges and terrorism is now a very serious security threat and problem around the world.
>
> Several countries including Malaysia have enacted similar legislations such as SOSMA and POTA (Prevention of Terrorism Act) to prevent and control terrorism within and outside their respective jurisdictions. The highest courts in some of these countries, where there have been challenges that these legislations were draconian, oppressive, unconstitutional, null, void and or invalid, have ruled that they are constitutional and valid in the interest of national security and public interest: see *Kartar Singh v State of Punjab* AIR 1995 SCW 2698; *People's Union of Civil Liberties and Another v Union of India* AIR 2004 SC 456; *A, X and Y, and another v Secretary of the State for the Home Department* [2002] EWCA Civ 1502.
>
> ...
>
> It has been held that an accused has no absolute right to discover the names and addresses of witnesses if a threat to their personal safety existed: see *United States v Palermo* 410 F 2d (7th Cir 1969). The rationale for a witness, who has been threatened or harassed or put in fear or who fears for his or her life or safety and therefore refuses to give evidence against an accused in the trial, is to allow him or her to give evidence in camera or in a special manner in order to encourage this witness to testify otherwise the case against the accused may collapse. This is in the public interest to encourage such a witness to testify especially if his evidence is relevant and material to the trial against that accused.

[94] This court is satisfied that ss 14, 15 and 16 do not violate the principle of equality under art 8(1).

[95] This court also finds that the plaintiff's allegation that there is a

violation of art 121(1) is without merit as there is no legal basis to protect the identity of the defence witnesses.

[96] At all material times, the discretion whether to treat a prosecution witness as a protected witness remains with the court which is duty bound to evaluate and assess the evidence given by the protected witness according to established principles of law both at the close of prosecution's case and at the end of the trial.

[97] For these reasons, this court holds that ss 14, 15 and 16 do not violate the judicial power under art 121(1) of the FC. This court is satisfied that these provisions are constitutional and valid and do not fall foul of arts 5, 8 or 121.

Sections 18A and 20

[98] Section 18A relates to statement by accused and reads:

> Any statement by an accused whether orally or in writing to any person at any time shall be admissible in evidence.

[99] Section 20 relates to documents or things seized or howsoever obtained and reads:

> All documents or things seized or howsoever obtained whether before or after a person has been charged for a security offence and the contents of the documents or things shall be admissible as evidence.

[100] The intention of promulgating these provisions can be found in the the Hansard dated 8 April 2015. The Deputy Home Minister said:

> ... saya mohon mencadangkan bahawa Rang Undang-undang Kesalahan Keselamatan (Langkah-Langkah Khas) (Pindaan) 2015 dibacakan kali kedua sekarang.
>
> ...
>
> Peruntukan Rang Undang-Undang Kesalahan Keselamatan (Langkah-Langkah Khas) (Pindaan) 2015. Elemen utama dalam rang undang-undang ini memperuntukkan seperti berikut;
>
> ...
>
> Fasal 6 memperuntukkan bahawa bagi kes kesalahan keselamatan, penyataan seorang tertuduh yang dibuat pada bila-bila masa hendaklah boleh diterima sebagai keterangan. Selain itu juga ia memperuntukkan bahawa seorang suami atau isteri terpaksa menzahirkan apa-apa komunikasi yang dibuat kepadanya semasa perkahwinan oleh mana-mana orang yang masih atau pernah dikahwini.
>
> ...

A Fasal 7 dan 8 memperuntukkan kebolehterimaan dokumen atau benda yang disita atau walau bagaimana jua sekalipun diperoleh sama ada sebelum atau selepas orang itu telah dipertuduh atas sesuatu kesalahan keselamatan dan kebolehterimaan senarai penggeledahan dokumen dan benda itu.

...

B Sebenarnya itulah yang saya sebut, Yang Berhormat. Walaupun barang itu boleh diterima tetapi dari sudut relevancy itu, itu yang ada hubung kait dengan dia punya chain of evidence Yang Berhormat sebut itu tadi. Kalau dia tidak ada kena mengena langsung walaupun boleh diterima, hakim masih boleh menolak tidak ada kena mengena dengan kes.

C Yang Berhormat, itu pendapat Yang Berhormat. Ini pendapat saya. Undang-undang ini pun macam itu juga, peguam pun macam itu, Yang Berhormat. Itulah sebabnya dalam sistem kita, Yang Berhormat boleh kata macam ini, yang ini boleh kata macam itu. Jadi akhirnya, hakim juga akan memutuskan sama ada the chain of evidence is okay, sama ada relevan ataupun tidak relevan, akan

D dipertimbangkan semua, Yang Berhormat.

...

... Jadi, 'walau bagaimana sekalipun diperoleh', ini berlaku apabila membuat raid dalam akta-akta lain umpamanya. Terdapat perkara-perkara yang ada hubung kait

E dengan keganasan, ada hubung kait dengan terrorism umpamanya. Kalau berjumpa perkara ini dalam situasi yang general evidential law mungkin akan ditolak oleh sebab tidak ada kena mengena dengan raid dia tadi, tetapi dalam undang-undang ini dikhususkan untuk undang-undang keganasan, menahan keganasan supaya boleh diterima sebagai bukti ...

F ...

Itu di bawah seksyen 20. Maknanya tidak ada soalan-soalan lain, soalan itu macam mana dia dapat dan masih boleh dipakai dan digunakan dalam membuktikan satu-satu kes. Soalan the weight of evidence, relevancy of evidence berhubung dengan kes tersebut dibawa ke mahkamah, masih terletak di atas meja ataupun

G bahu hakim di mahkamah tersebut.

...

... Itulah saya sebut daripada awal tadi dan saya tekankan lagi di sini bahawa peringkat penerimaan sesuatu bukti itu, satu admissibility of bukti itu sendiri masuk ke mahkamah atau di hadapan hakim. Di peringkat awalnya,

H undang-undang ini mengatakan hakim terpaksa menerima apa-apa bukti yang dibawa ataupun didapati sedemikian rupa dan diterima oleh hakim sebagai bukti dan tidak boleh ditolak begitu sahaja berlandaskan sebagaimana juga rakan-rakan ada menyebut umpamanya, statement yang diambil menerusi caution statement dan sebagainya tadi dinilai dulu dalam trial within trial dan mengetahui sama ada paksaan atau inducement dan pelbagai lagi, mendapatkan itu baru menilai sama

I ada admissible ataupun tidak admissible. Dalam undang-undang ini, untuk kes-kes keganasan, admissibility no longer become an issue. Itu sebenarnya.

Akan tetapi sebagai confession itu juga, macam caution statement itu juga, nilai caution statement itu juga akan dinilai oleh hakim, dilihat oleh hakim, adakah dia the way of the evident yang diterima menerusi caution statement ataupun

confession itu ada nilai-nilai yang boleh diterima oleh hakim untuk mendatangkan satu conviction kepada orang yang dituduh.

[101] Sections 18A and 20 merely provide for the admissibility of an accused's statements, documents, and physical evidence. The evidence admitted under these provisions remains subject to the court's independent evaluation and assessment adduced both by prosecution and defence.

[102] This finding is supported by the judgments in the following cases:

(a) *Public Prosecutor v Aszroy bin Achoi* [2018] 9 MLJ 702, wherein Ravinthran Paramaguru J (as His Lordship then was) held at p 709:

> Finally, it is essential to note that the accused had voluntarily furnished the password to the 'Yohyo Illa'nun AlSaba Malizia' Facebook account and the 'Al Borneozy' Facebook account to the investigating officer. The username he gave for the said accounts are the mobile Nos 013-5409158 and 019-8039610. He also confessed in his statement after arrest (P52A) that he is the owner of the said Facebook account 'Yohyo Illa'nun AlSaba Malizia'. The Facebook account 'Yohyo llla'nun AlSaba Malizia' could be accessed by using the password provided by the accused. This fact provides strong corroborative evidence that the accused is the owner of the said account and it lends credence to his confessionary statement made after arrest.
>
> The confessionary statement of the accused was admitted into court pursuant to s 18A of the SOSMA ...
>
> Counsel for accused objected to the statement on the ground that it is not admissible under the Criminal Procedure Code. I overruled the objection as the SOSMA is a special law that governs trials of security offences. In accordance with the basic principle of statutory interpretation captured in the Latin maxim generalia specialibus non derogant which means that the general provisions of the law must yield to special provisions of the law, I hold that s 18 overrides any impediment to the admission of the said statement that is found in the Criminal Procedure Code or the Evidence Act 1950. In fact, s 18 is found in Part VII of the SOSMA and s 17 enacts that Part VII shall have effect notwithstanding any inconsistency with the Evidence Act 1950.

(b) *Public Prosecutor v Jafperi bin Noor & Anor* [2024] 11 MLJ 289; [2024] 7 CLJ 827, wherein Noorin Badaruddin J (as Her Ladyship then was) held at p 299 (MLJ); p 834 (CLJ):

> The prosecution relied heavily too on the statement given by both the accused persons (P145 and P154) which is said to have supported the evidence of the seven migrants in their respective depositions. P145 and P154 were admitted as evidence pursuant to s 18A of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). It was highlighted that the mobile number 011–10656446 was registered under the first accused's name and was used by him which is consistent with the depositions and the WhatsApp

screenshots obtained from the seven migrants.

It is further argued that the prosecution did not have to prove the act of smuggling by both the accused persons as provided in s 26A and s 2 of the ATIPSOM as the act of arranging, organising or facilitating directly or indirectly is sufficient to prove the act of smuggling of migrants.

Although P145 and P154 were admitted as evidence under s 18A of the SOSMA, both statements must not be evaluated in isolation but instead it must be evaluated together with the other evidence adduced ie, whether the evidence adduced supports the statement made by both the accused persons.

(See also *Siti Noor Aishah*, *Pendakwa Raya lwn Mahadi bin Mamat* [2025] 8 MLJ 591 at pp 612 and 641–644.)

[103] The court finds that the admissibility of statements and exhibits under ss 18A and 20 of the SOSMA does not violate the right to a fair trial. While these provisions mandate the admission of such evidence, they do not abrogate judicial power. The court retains the ultimate authority to evaluate the credibility and weight of this evidence at both the close of the prosecution's case and the conclusion of the trial. The detenus retain their right to challenge the evidential value of all materials presented against them.

[104] This rationale was most clearly articulated in *Ketheeswaran* wherein the learned CJ held:

> Further, it can be concluded from the cases explaining the differences between prima facie evidence and prima facie cases, prima facie evidence is merely accepted at face value as being credible but it is by no means conclusive proof because such evidence remains rebuttable. Taking this conclusion to its logical end, it stands to reason that the courts considering such evidence remain under the obligation to evaluate that evidence as they would any other evidence before them using the correct standard respectively at the close of the prosecution's case and again at the close of the defence case, if defence is called.
>
> As is a general rule of evidence, legal practice, prudence and good sense, that narrative must still be established or proved. Thus, at the risk of repetition, the fact that s 61A renders such evidence prima facie evidence merely means that the depositions can be believed at face value — even when they go to the extent of establishing the ingredients of the charge. That however, does not absolve the prosecution from substantiating the depositions with other evidence to establish the offence whether it is assessed from the angle of proving a prima facie case or proving the offence beyond a reasonable doubt at the close of defence. The court too, remains under the obligation to appropriately weigh and evaluate the evidence on record at both stages of the criminal proceeding (prosecution and defence stages). This remains true whether the witness testifies indirectly via a deposition or directly in court.
>
> ...

> We accept the respondent's position effectively that s 61A merely gives them an evidential advantage given the inability to call those witnesses while at the same time retaining their obligation to prove their case according to the accepted standards of criminal law while also retaining the judicial obligation to weigh and evaluate evidence.
>
> ...
>
> In this regard, we find that Parliament is expressly empowered by the FC itself to enact laws relating to evidence which will necessarily be applied in court. As has clearly been done in the past, different situations may require different laws to address those situations. For instance, in *Gan Boon Aun*, this court held that the use of single presumptions is a legally acceptable evidential measure. It cannot be viewed as violating judicial power and this has also been implied in the judgment of this court in *Abdullah bin Atan* at paras [45]–[46]. Without establishing a rule too wide, we opine that what remains paramount in an assessment of whether judicial power has been abrogated in violation of art 121(1) is to ask whether the Judiciary has been denied the complete ability to exercise its powers of adjudication in totality or that it has been rendered illusory. Going by *Maria Chin*, the pure and genuine enactment of laws that regulate evidential procedure cannot per se amount to such a dereliction.
>
> In the present case, having examined s 61A by itself and in context earlier, we find that judicial power has in no way been abrogated, curtailed or subjugated to the Legislature by any means whatsoever. It was earlier seen and clarified that the use of the phrase 'prima facie evidence' by no means has the conclusive effect as erroneously proposed by the appellants. In all cases, the defence retains the ability to call rebuttal evidence and the Judiciary retains the obligation to evaluate all the evidence at the close of the prosecution's case sufficient to warrant a conviction before calling for defence. In the circumstances, we reject the appellants' contention that s 61A violates art 121(1). In fact, we find that the provision is entirely consistent with art 121(1).
>
> ...
>
> And, while the deprivation of the ability to cross-examine appears to be a disproportionate measure vis a vis other general criminal trials, the right to lead rebuttal evidence by the defence and the retention of the prosecution's general obligations to meet its heavy legal burdens (prima facie case and beyond reasonable doubt), remain. We therefore find that s 61A, when read on a whole, is a proportionate intrusion into the right to a fair trial as against the legislative reasons for its enactment.
>
> For the foregoing reasons, we are unable to agree with the appellants that s 61A violates art 8(1). We therefore concur with the respondent that s 61A is not unconstitutional on this ground.

[105] For these reasons, this court is satisfied that ss 18A and 20 are constitutional and valid and did not fall foul of arts 5, 8 or 121.

Section 30

[106] Section 30 relates to detention pending exhaustion of legal process and reads:

> (1) Notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor.
>
> (2) Upon application by the Public Prosecutor under subsection (1), the court shall remand the accused in prison pending the filing of the notice of appeal.
>
> (3) When the Public Prosecutor files a notice of appeal against the acquittal, the Public Prosecutor may apply to the trial court for an order to commit the accused remanded in custody of the police to prison pending the disposal of the appeal.
>
> (4) Upon application by the Public Prosecutor under subsection (3), the court shall commit the accused to prison pending the disposal of the appeal.
>
> (5) If the appeal of the Public Prosecutor is dismissed and the order of acquittal is affirmed, the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against the decision of the Court of Appeal by the Public Prosecutor.
>
> (6) Upon application by the Public Prosecutor under subsection (5), the court shall remand the accused in prison pending the filing of the notice of appeal.
>
> (7) An accused committed to prison under this section shall be held until all appeals are disposed of.

[107] Section 30 essentially provides for the continued detention of the detenu until the exhaustion of the legal process against him.

[108] The rationale for enacting this provision is found in the Hansard dated 17 April 2012 wherein Dato' Seri Mohamed Nazri bin Abdul Aziz said:

> Akan tetapi you kena faham, sistem negara kita, sistem undang-undang negara kita, kita ada appeal. High Court to Appeal Court, Appeal Court to Federal Court. Jadi ini proses perundangan kita. Bermakna walaupun diambil keputusan di peringkat Mahkamah Tinggi, ada ruang untuk merayu. Bukan sahaja kepada prosecutor tetapi juga kepada dia.
>
> Jadi ini satu proses mahkamah yang tidak boleh kita ketepikan. Bayangkan seorang terrorist walaupun satu hah kita lepaskan dia katalah bila kita bagi intention we are going to appeal. The appeal will take sometimes. Akan tetapi hendak buat macam mana? Ini adalah proses perundangan kita. Kalau kita lepas dia satu hari dia pengganas, bayangkan dia akan hilangkan diri dia.
>
> ...
>
> ... Tuan Yang di-Pertua, saya tidak pernah kata judicial detention untuk penyiasatan. Ini kerana di peringkat High Court, apabila katalah yang tersangka itu dilepaskan, maka prosecution akan bangun dan memberitahu bahawa mereka ada niat untuk merayu. Jadi kalau dia ditahan selepas itu, judicial detention itu bukan untuk hendak menyiasat dia lagi. Tidak. Ini kesalahan keselamatan, bahayanya

kalau dia dilepas. Katalah rayuan memakan masa dan kita lepas dia dan dia didakwa di bawah akta ini, dangerouslah. Jadi kalau kita lepas dia, dia boleh menghilangkan diri dia atau pun dia akan melakukan perkara yang lebih berbahaya. Kita tidak boleh ambil risiko ini kerana akhirnya kalau sesuatu itu berlaku, katalah waktu dia dilepaskan sementara menunggu rayuan, kita lepaskan dia. Pada ketika itu dia melakukan sesuatu, akhirnya tanggungjawab itu bukan kepada pembangkang. Tanggungjawab itu ialah kepada kerajaan. Sudah tahu seseorang ini didakwa di bawah akta ini, dilepas buat apa? Jadi sebab itu it is paramount ...

...

Pertama, saya hendak beritahu kepada Yang Berhormat Batu iaitu di peringkat terpakainya seksyen 30 ini, ini adalah peringkat sudah dibicarakan. Iaitu di peringkat mahkamah — bukan Mahkamah Sesyen Yang Berhormat Sungai Siput, Mahkamah Tinggi. Ia sudah dibicarakan. Jadi penahanan ini lagi reman untuk menyiasat. Penahanan ini dia menyentuh mengenai peruntukan penahanan sementara penunggu proses, undang-undang habis. Fasal 30(2) menyentuh mengenai perintah reman terhadap tertuduh di dalam penjara sementara menunggu notis rayuan difailkan.

Peruntukan ini adalah amat mustahak kerana tertuduh yang dilepaskan oleh mahkamah setelah perbicaraan berlangsung itu, masih merupakan ancaman kepada keselamatan negara. Jadi, kalau seperti yang dicadangkan oleh Yang Berhormat iaitu kita letak peranti dan kemudahan kita bail ataupun kita suruh dia laporkan kepada police station tiap-tiap hari. Hari pertama kita lepaskan dia, dia cabut lari, ini semua tidak boleh pakai sudah. Dia merupakan ancaman dan pembebasan oleh mahkamah, tidak — bila kita bebas daripada mahkamah dalam tuduhan ini, ia tidak boleh dianggap ancaman terhadap keselamatan negara telah terhenti.

Peruntukkan ini mempunyai konsep yang sama seperti mana Yang Berhormat kita Bukit Gelugor sebut sebentar tadi iaitu seksyen 56A, Akta Mahkamah Kehakiman 1964 dan juga seksyen 315, Kanun Tatacara Jenayah. Jadi kita, sedar tentang kehadiran kedua-dua peruntukan ini. Jika kita memenuhi peruntukan seksyen 56A, Courts of Judicature Act, terlalu lewat kerana tertuduh apabila diputuskan tidak bersalah akan melompat lari keluar tidak. Dari mahkamah dia boleh keluar sudah. Kita terlalu banyak kejadian yang telah berlaku, yang memecahkan, keluar tingkap mahkamah untuk melepaskan diri, inisemua sudah berlaku. Apatah lagi seorang pengganas.

Jadi Yang Berhormat, kita sedar bahawa dia adalah bertentangan, maka oleh kerana itu, oleh kerana seperti saya sebut daripada awal lagi, ini merupakan kesalahan keselamatan yang tidak boleh disamakan dengan ordinary criminal offences, dengan izin. Maka oleh kerana itu kita perlu kepada seksyen 30 ini sebagai untuk menyatakan bahawa ia boleh dilakukan. Jadi, walaupun dia bertentangan tetapi saya kira, di sini kita yang buat undang-undang. This is legislative assembly. Kita boleh mengadakan undang-undang dan mahkamah hanya dia interpret sahaja. Di sini kita masukkan kerana untuk menyatakan bahawa ia boleh dilakukan in spite of seksyen 56A yang disebut oleh Yang Berhormat sebentar tadi. Terima kasih.

[109] This court was mindful that in *Semenyih Jaya*, the Federal Court reasserted the sanctity of judicial power —the power to adjudicate and make

final determinations — under art 121(1). The learned judge held at p 595 (MLJ):

> The case of *Public Prosecutor v Dato' Yap Peng* highlights that the exercise of judicial power carries two features. The first is that judicial power is exercised in accordance with the judicial process of the judicature.
>
> This is also illustrated by Gaudron J, in *Wilson and Ors v The Minister For Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 at p 22 when he said that:
>
> > For the moment it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. It depends on the courts acting in accordance with the judicial process. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process. So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process.
>
> ...
>
> The second feature is that judicial power is vested only in persons appointed to hold judicial office. Therefore, a nonjudicial personage (ie a non-member of the judicature) has no right to exercise judicial power. In Dato' Yap Peng, the former Supreme Court struck down the power conferred on the attorney general bys 418A of the Criminal Procedure Code which empowered him at any time to transfer (by way of a certificate) a case from the subordinate court to the High Court, which the Federal Court classified as essentially a judicial function. Mohd Azmi SCJ held that:
>
> > Clearly, judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by s 418A cannot be conferred on any organ of government other than the Judiciary.
>
> ...
>
> We are of the view that the discharge of judicial power by nonqualified persons (and not by judges or judicial officers) or nonjudicial personages render the said exercise ultra vires art 121 of the Federal Constitution.
>
> This observation is fortified by the other provisions in the Federal Constitution such as are found in art 122AA:
>
> (a) art 122AA provides that each of the High Courts (of Malaya and Sabah and Sarawak) 'shall consist of the Chief Judge and other Judges'.
>
> In our view, the peremptory provision in art 122AA is explicit in its truism in that it is not permissible for assessors (as non-judicial personages) to sit in the High Court;

(b) this is further emphasised by art 122AA(2) where the composition of the High Court shall be of judges 'designated' to sit in the High Court. These are persons entitled and qualified for appointment as provided for in art 122B;

(c) by art 122B(5) of the Federal Constitution, it is clear that a person designated to sit as a judge of a High Court shall be a person qualified under art 123 and appointed under art 122B; and

(d) art 122B of the Federal Constitution provides for the appointment of judicial commissioners to perform functions of a High Court judge. However there is no provision in the Constitution that allows assessors to perform the functions of a High Court judge.

...

Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.

(See also *Keetheeswaran* at p 882.)

[110] This court finds that the mandatory nature imposed by the word 'shall' abrogates the inherent judicial power of the courts, compelling them to detain an individual who has already been judicially acquitted; simply because the prosecution intends to appeal.

[111] The judge is no longer an independent arbiter of justice and is left with no discretion to consider the merits of the acquittal or the individual circumstances of the detenu. This automatic detention undermines the finality of a judicial acquittal.

[112] This provision has the effect of striping the Judiciary of its adjudicatory function and reducing judges to act as mere rubber stamps on the application by the prosecution.

[113] The defendant's reliance on *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 113, is unfounded. In that case, a challenge was mounted on the constitutionality of s 56A of the Courts of Judicature Act 1964 (Act 91) which reads:

Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

[114] In rejecting the challenge, Zulkifle Makinuddin CJ held at p 754:

As regards the appellant's contention on the unconstitutionality of s 56A of the CJA which allows the prosecution to effect his arrest and subsequent detention after his

acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts 5(1) and 8(1) of the FC, with respect we could not agree with such a contention. On this issue the question is whether there is a specific law authorising such deprivation of the applicant personal liberties (see the case of *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372). It is also to be noted that art 5(1) of the FC *provides as follows:*

> No person shall be deprived of his life or personal liberty save in accordance with law.

The law on point is therefore s 56A of the CJA which is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the state. Section 56A of the CJA in our considered view serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who had been acquitted by the High Court (see the case of *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830).

...

Furthermore, in the present case, the prosecution has filed a notice of appeal against the acquittal decision of the High Court. On this point it is important to consider that an appeal is a continuation of a trial (see the case of *Balasingam v Public Prosecutor* [1959] 1 MLJ 193). Consequently, the criminal proceedings against the appellant is continued. This gives jurisdiction to the Court of Appeal to rehear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. It is our judgment that the power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant It would not be desirable that pending the appeal against acquittal of a capital offence such as drug trafficking, the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court.

...

As regards the suggestion of learned counsel for the appellant that the prosecution must also tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court, with respect we do not think that the prosecution is required to do so. It would be sufficient if the prosecution could show to the court that it has a strong likelihood of success in the appeal proper. On this point we need to state here that in most cases the full written judgment of the trial judge and the notes of proceedings would not be readily made available soon after the decision of the case is delivered. Therefore, in our view, at the stage of its application under s 56A of the CJA as in the present case, the prosecution would not be placed in a position to put up a proposed petition of appeal to state that the order of acquittal recorded by the High Court is perverse or clearly erroneous in the face of the record. We agree with the view expressed by the Court of Appeal that the merits of the prosecution's appeal in an application under s 56A of the CJA is not a relevant matter for consideration.

[115] This court finds that unlike the legal requirements established in *Bird Dominic Jude* and s 56A of Act 91, s 30 imposes no substantive burden of proof on prosecution. Under the former, prosecution is generally expected to demonstrate a 'strong likelihood of success' or provide compelling justifications to warrant the continued detention of an acquitted individual.

[116] Section 30 on the other hand, operates automatically; prosecution is under no compulsion to show the merits of their intended appeal or prove that the acquittal was perverse or clearly erroneous. The judge is compelled to grant a remand order merely on prosecution's application, without any preliminary judicial assessment of the merits of the appeal succeeding, or the fact that a court has already acquitted the detenu.

[117] In fact, by allowing the continued detention of an individual whom the court has already found not guilty, the acquittal is negated and rendered meaningless.

[118] For this reason, this court finds that s 30 is unconstitutional and invalid as it offends art 121(1).

CONCLUSION

[119] For the reasons set out above, this court holds that although ss 4(5), 13, 14–16, 18A and 20 modify traditional procedural or evidentiary rules, they do not displace the core adjudicatory function of the Judiciary.

[120] Under these provisions, the court retains judicial oversight in that they retain the inherent power to assess the credibility, weight, and relevance of evidence. The Judiciary remains the final arbiter of fact. As these measures allow the detenu a chance to challenge the prosecution's case, they remain consistent with the right to a fair trial under art 5 and are shielded by the special legislative powers granted under art 149.

[121] Sections 4(5), 13, 14–16, 18A and 20 also satisfy the satisfy the principle of proportionality and have a rational nexus with the objective of SOSMA.

[122] The plaintiffs have failed to discharge the heavy legal burden of proof required to demonstrate that these provisions are unconstitutional.

[123] This court holds that mandatory remand requirement in s 30 violates the sanctity of judicial powers vested in the Judiciary and ignores the role of judges as arbiters.

A **[124]** While the Legislature maintains the authority to enact special measures for security offences under art 149, those laws cannot completely extinguish the core adjudicatory functions of the Judiciary. Therefore, s 30 is struck down as an impermissible abrogation of judicial power under art 121(1).

B DECISION

[125] This court dismisses encl 1 in respect of ss 4(5), 13, 14, 15, 16, 18A and 20 and holds that these provisions are constitutional and valid.

C **[126]** This court declares that s 30 is unconstitutional and invalid as it violates art 121(1).

[127] There shall be no order as to costs.

D POSTLUDE

The court records its appreciation to both counsel and federal counsel for their diligent work. Their thorough written and oral submissions greatly assisted this court in considering encl 1 and finalising the grounds of judgment.

E

Sections 4(5), 13, 14, 15, 16, 18A and 20 of the SOSMA were constitutional and valid; s 30 of the SOSMA was unconstitutional and invalid as it violated art 121(1) of the Federal Constitution; no order as to costs.

F

Reported by Dzulqarnain Ab Fatar

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H

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